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## Throwing *Canis Lupus* to the Wolves: *United States v. McKittrick* and the Existence of the Yellowstone and Central Idaho Experimental Wolf Populations Under a Flawed Provision of the Endangered Species Act

### I. INTRODUCTION

In 1997, at least twenty-five calves from the Diamond G Ranch, located approximately fifty miles south of Yellowstone National Park in northwest Wyoming, were killed and eaten by a band of wolves known as the Washakie Pack.<sup>1</sup> The Washakie Pack is an unplanned break-off from an experimental population of Rocky Mountain gray wolves reintroduced by the United States government in 1995 to Yellowstone National Park, a place where wolves had not existed in significant numbers for many years.<sup>2</sup> Though the pack's lead wolf was killed by wildlife officials in 1997, and its replacement was killed in 1998, the pack continues to stalk calves and torment ranch hands today as it did in 1997 and 1998.<sup>3</sup>

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1. See John Gibeaut, *Endangered Again*, A.B.A. J., July 1999, at 55.

2. See *id.* Although it is clear that before government reintroduction wolves had not existed in Yellowstone National Park in significant numbers for many years, there is considerable debate over whether they were present in the Park in smaller numbers. Some wildlife experts claim that during the years preceding reintroduction, wolves did not exist in the park at all. Others argue, however, that, at least in small numbers, they did. See *infra* note 81 and accompanying text.

3. See Gibeaut, *supra* note 1, at 58; see also *Wolf Pack Member May Have Killed Colt*, OMAHA WORLD-HERALD, July 8, 1999, at 24 ("A wolf believed to be a member of a pack that has repeatedly attacked animals on a ranch near Dubois killed a newborn colt at the ranch last week. . . . Federal wildlife officials believe the killer is from the Washakie Pack, which took up residence in the area about two years ago. Three members of the pack were shot and killed over the last two years because they had attacked dogs and calves belonging to the ranch."). Wildlife officials were not blind to the possibility of clashes between humans and the reintroduced wolves when the wolves were released into the wild in 1995. Congress expected that there would be times when a negative interaction between reintroduced wolves and humans would result in the killing of members of the experimental population. See generally H.R. REP. NO. 97-567 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807. The Final Rules for reintroduction into Yellowstone National Park included provisions on how to deal with such clashes. See Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,255-57 (1994) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Animals and Plants, 50 C.F.R. § 17.84 (1998). Not all ranchers, however, are

Northern Wyoming is not the only area to suffer deadly attacks by government-reintroduced wolves in the last few years. In June of 1999, at least one wolf attack on a calf was confirmed in New Mexico, and wolves are suspected to have been involved in the killing of many other livestock, as well as in the harassing and killing of local ranch dogs.<sup>4</sup> The suspected wolves, a group of Mexican gray wolves known as the Pipestem Pack, were released in 1998 into the Apache National Forest along the Arizona-New Mexico border by agents from the Fish and Wildlife Service (FWS).<sup>5</sup> Like their Yellowstone counterparts, the Pipestem wolves were reintroduced into an area where they had not existed in many years.<sup>6</sup> In recent years, attacks by government-reintroduced wolves have also been confirmed in Idaho, Montana, and North Carolina.<sup>7</sup>

Ruthless and savvy, wolves are considered by many “ranchers, loggers, [farmers,] and others who work the land” to be “nature’s

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happy with the scope, enforcement, or severity of the Final Rules. *See* Gibeaut, *supra* note 1, at 55; Mike Taugher, *Livestock Loss to Wolves Estimated at 700*, ALBUQUERQUE J., July 21, 1999, at B3.

4. *See* Barry Burkhart, *Official Confirms Wolf Attack*, ARIZ. REPUBLIC, June 27, 1999, at C19 (reporting that a biologist for the U.S. Department of Agriculture’s Wildlife Services confirmed that the marks on an injured calf are consistent with those of a wolf attack); *see also* Taugher, *supra* note 3, at B3 (reporting that an expert hired by New Mexico ranchers estimates that reintroduced Mexican gray wolves are responsible for killing more livestock than the Fish and Wildlife Service believes).

5. *See* Gibeaut, *supra* note 1, at 55. *See also* Richard L. Smith, *Endangered Mexican Wolves Get Help with Zoological Center*, WACO TRIB.-HERALD, Jan. 16, 2000, at 6 (reporting on government efforts to reintroduce the Mexican gray wolf to its historic range in the southwestern United States).

6. *See generally* Steven Cribb, *Endangered Species Act, Section 10(J): Special Rules to Reestablish the Mexican Gray Wolf to its Historic Range in the American Southwest*, 21 ENVIRONS ENVTL. L. & POL’Y J. 49 (1998).

7. *See* Courtenay Thompson, *Idaho Ranchers Finding Wolves’ Return a Burden*, SEATTLE TIMES, Sept. 19, 1999, at B6 (“Wildlife officials have confirmed nine cattle killed this year by Idaho wolves, nine more probably killed by wolves and 54 confirmed sheep kills.”); Jim Robbins, *With Return of Wolves to West, Predatory Habits Bring Back Fear and Anger*, N.Y. TIMES, Dec. 29, 1995, at A22 (reporting on wolf attacks in Montana by reintroduced wolves); Ruth Sheehan, *Lawsuit Threatens Recovery of Red Wolf Population*, NEWS & OBSERVER (Raleigh), May 27, 1997, at A1 (reporting that reintroduced red wolves are being blamed for the killing of livestock in eastern North Carolina). Though wolves are doing damage in the United States, ranchers in this country are certainly more fortunate than people living in a number of villages in northern India. Wolf problems in that country, a result of a ban on hunting in order to facilitate the conservation of the species, include wolves carrying away, mauling, and then eating infants and small children. As of August 1996, at least 18 children had been reported taken by wolves. *See* Christopher Thomas, *Hunters Stalk India’s Baby-Snatching Wolfpack*, TIMES (London), Aug. 14, 1996.

equivalent of urban street gangs—relentless killing machines that threaten their livelihoods.”<sup>8</sup> Some fish and game departments, concerned that game herds will be depleted by wolves, have much the same feeling.<sup>9</sup> To these people, the reintroduction of wolves to wilderness areas near their homes and workplaces is a nightmare at best, as many of them must now focus more on protecting their livestock

8. Gibeaut, *supra* note 1, at 56. Clashes between wolves and ranchers are not just an American phenomenon; many ranchers, shepherds, farmers, and governments throughout the world are currently facing the same wolf-related problems as their American counterparts. *See generally* L. David Mech, *Wolf Recovery Also Means Wolf Control*, STAR TRIB. (Minneapolis), Mar. 20, 1999, at 23A (reporting that a number of countries, including Slovenia, Croatia, Sweden, Norway, and Spain, are currently dealing with wolf problems); Susannah Herbert, *French Farmers Demand Fightback as Wolf Returns*, DAILY TELEGRAPH (London), Aug. 2, 1999, at 10 (explaining the problems French herdsmen are having with protected wolves that have recently crossed the Alps from Italy); Robert Rees, *Disagreement Abundant Over Wolves of Golan*, STAR TRIB. (Minneapolis), Nov. 1, 1998, at 25A (reporting on current controversy in Israel regarding the growing number of wolves in the Golan Heights and the protection given them by the Israeli government); Christopher Cairns, *Wolf Plan Off After Howls of Local Protest*, SCOTSMAN (Edinburgh), Feb. 11, 1997, at 7 (introducing the conflict between ranchers and wildlife officials over the proposed reintroduction of wolves to the Scottish highlands); Thomas, *supra* note 7 (reporting that, as a result of a ban on the hunting of wolves in northern India, villages are being terrorized and children taken and eaten by growing wolf packs). Because the United States is one of the first nations in the world to effect a wolf-reintroduction plan, the manner in which American courts deal with the issues in these cases may very well affect what other countries do with wolves on their own soil.

Those ranchers and farmers who have lost livestock to reintroduced wolves have no legal recourse against those who reintroduced the wolves—namely the United States. This is due to the fact that, under federal law, the United States is not liable for damage caused by wild animals, even when those wild animals are in a position to cause damage only because the government placed them there. *See Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950) (holding that the United States is not liable for harm caused to a farmer's crops by migratory waterfowl which are under the protection of federal law). In the case of the Yellowstone and Idaho wolves, a private conservation group called Defenders of Wildlife has pledged to reimburse ranchers in the experimental area for confirmed losses of livestock to wolves. *See Thompson, supra* note 7, at B6. The solution is not a perfect one, however, because oftentimes ranchers cannot conclusively confirm that dead or missing livestock have been killed or taken by wolves. *See id.*

Though some ranchers and farmers have suffered economic losses as a result of the reintroduction of wolves to Yellowstone National Park, others, particularly companies that conduct wildlife and photography tours in the Park, have experienced significant economic benefit. The wolves “have become a powerful tourist attraction that is pumping significant amounts of money into the region's economy.” *Call of the Wolves Attracting Tourists*, DESERET NEWS (Salt Lake City), Jan. 18, 2000, at B6. *See also* Holly Doremus, *Private Property Interests, Wildlife Restoration, and Competing Visions of a Western Eden*, 18 J. LAND RESOURCES & ENVTL. L. 41, 49 (1999) (reporting that economic benefits from tourism in the Yellowstone region are expected to reach approximately twenty-five million dollars per year in the next few years, due in part to the return of wolves and people's desires to see those wolves in the wild).

9. *See* Cribb, *supra* note 6, at 52.

and goods from wolves than on doing their jobs.<sup>10</sup> In fact, some ranchers have even considered moving their animals to escape herd depletion at the hands of reintroduced wolves.<sup>11</sup>

To others, however, the introduction of wolves to areas where they used to exist, but no longer do as a result of human conduct, is a source of unequaled pleasure. To many wildlife activists and conservationists the return of the wolf to these areas “replenishes a part of the wilderness that’s been missing in some regions for more than a century.”<sup>12</sup> To some biologists and other scientists, reintroduction also “fills a niche at the top of the food chain and keeps other animals in check, such as burgeoning deer and elk herds.”<sup>13</sup> For these individuals, reintroduction is something that has been too long in coming.

As tends to occur when controversial issues such as wolf reintroduction arise, battle lines have been drawn and shots fired from both sides. In 1998, at least five of the eleven Mexican gray wolves, released that year by officials from Fish and Wildlife Service into the Apache National Forest along the New Mexico-Arizona border, were shot and killed by unknown persons assumed to be opposed to the reintroduction.<sup>14</sup> Additionally, public shouting matches between en-

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10. See Gibeaut, *supra* note 1, at 55; see also Florangela Davila, *Wolf's Journey Upsets Some—Oregon Ranchers Object to Having Animal Nearby*, SEATTLE TIMES, Mar. 21, 1999, at B1 (reporting on the concerns expressed by Oregon ranchers at the appearance of a reintroduced wolf in northeastern Oregon); James Coates, *Ranchers Howl in Protest at Wolves' Return to Park*, CHI. TRIB., June 29, 1986, at 3 (reporting on the concerns expressed by Wyoming farmers and ranchers in 1986 at the proposed reintroduction of wolves to their state).

11. See Toni Williams, *FWS Confirms Wolf Attack on Calf*, EASTERN ARIZ. COURIER, June 30, 1999 (visited Feb. 22, 2000) <<http://www.eacourier.com/news/stories/99063007n.html>>. (“Continued harassment of his ranch dogs is apparently causing rancher Scott Dieringer to consider relocating his operations to Wikieup.”).

12. Gibeaut, *supra* note 1, at 56; see also Doremus, *supra* note 8, at 44 (stating that some people see the restoration of wolves to the wild as a perfect way to make reparations for past efforts to eradicate the wolf from North America).

13. Gibeaut, *supra* note 1, at 56. For a general report on the ecological effects that wolf reintroduction has had on Yellowstone National Park's ecosystem, see Jim Robbins, *In 2 Years, Wolves Reshaped Yellowstone*, N.Y. TIMES, Dec. 30, 1997, at F1 (“They have killed half the coyotes in the area, forced elk to become more vigilant and provided many opportunities for scavengers to share their kills. Because there are fewer coyotes, rodents are more plentiful, a boon for predators like hawks and bald eagles, and overall biodiversity has sharply increased.”). See also Roger Di Silvestro, *No Longer Top Dog: Studies of Coyotes in Yellowstone National Park Show that Wolf Reintroduction is Changing the Canine Social Hierarchy*, NAT'L WILDLIFE, Oct. 20, 1996, at 14 (reporting on the ecological effect that wolf reintroduction in Yellowstone National Park has had on the park's previously dominant coyote population).

14. See Gibeaut, *supra* note 1, at 55. See also Andrew Murr, *Deadly Days for Wolves*,

vironmental groups and those who disfavor the return of wolves to their historic ranges have not been uncommon in the past few years.<sup>15</sup> Even state legislatures and governors have entered the fray, most condemning even the mere thought of wolf reintroduction in their respective states.<sup>16</sup> Members of New Hampshire's legislature expressed unwelcome feelings towards the possibility of reintroducing wolves to their forests, and state governments in Wyoming, Montana, and Idaho have been loathe to assist in wolf-reintroduction programs in their respective states.<sup>17</sup> In the eyes of these lawmakers, the wolves simply are not welcome.<sup>18</sup>

Now the battles over whether wolves should be reintroduced to

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NEWSWEEK, Nov. 30, 1998, at 34. Wildlife officials are currently investigating the shootings and intend to prosecute those involved. See Steve Yozwiak, *Wolf Releases Symbolize Frustrations; Area Residents Believe Animal Represents End to Way of Life*, ARIZ. REPUBLIC, Dec. 11, 1998, at A1 ("[Shooting of wolves is] a federal crime that carries a potential fine of \$100,000 and a year in prison. A state-federal task force is investigating, but so far has not filed charges against anyone. A \$50,000 reward has been offered for the capture of the wolf killers."). For a general look at the controversy that has arisen over the reintroduction of Mexican gray wolves in the southwestern United States, see Kim Cobb, *Wolf Recovery Task on Endangered List; Animals' Deaths Strain Relations Between Locals, Federal Officials*, HOUS. CHRON., Nov. 29, 1998, at A1 (examining the death of reintroduced Mexican gray wolves and the general controversy that has arisen as a result of reintroduction efforts in the southwestern United States).

Wolves are not the only animals that have been killed in opposition to wildlife-reintroduction efforts. In the past three years alone, small numbers of sea otters and condors have been found dead of unnatural causes shortly after their release into the wild. See Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 2 (1999).

15. See Gibeaut, *supra* note 1, at 55.

16. See *id.*; see also Cribb, *supra* note 6, at 52. Wyoming's legislature was particularly appalled at the thought of wolf reintroduction into its state; in 1995 it "approved a \$1,000 bounty on wolves killed while preying on livestock outside the park. The measure was vetoed by Gov. Jim Geringer, who said he appreciated the sentiment but didn't want to contradict federal law." David Foster, *Wolves' Big, Bad Image Hampers Restoration Effort in Northern Rockies*, L.A. TIMES, July 2, 1995, at A20. But see Douglas Gantenbein, *The Music of the Woods: A Proposal to Return Wolves to Olympic National Park is on the Fast Track*, NAT'L PARKS, Jan. 11, 1998, at 26 (reporting that at least one legislator supports the return of the gray wolf to Olympic National Park in Washington State).

17. See Gibeaut, *supra* note 1, at 56-58.

18. Though not all wildlife-restoration efforts are accompanied by the volatile contention that has plagued recent wolf-reintroduction efforts, controversy surrounding wildlife reintroduction is not a new phenomenon. In 1904 New York state implemented the first beaver reintroduction plan in United States history. Not surprisingly, the beaver began to fell trees, which raised the ire of local landowners. In *Barrett v. New York*, 116 N.E. 99 (N.Y. 1917), one landowner sued the state of New York, seeking compensation for his losses. He lost the suit, the government did not compensate him for his losses, and the beaver were allowed to stay. See Doremus, *supra* note 8, at 43. Since that time, challenges to reintroduction on the grounds that they constitute a Fifth Amendment taking have been wholly unsuccessful.

their historic ranges have reached the courts.<sup>19</sup> In a 1997 case, *Wyoming Farm Bureau Federation v. Babbitt*,<sup>20</sup> Judge William F. Downes of the United States District Court for the District of Wyoming specifically addressed questions of wolf reintroduction into the northern Rocky Mountain area. He ultimately ruled that the reintroduction of wolves into the Yellowstone area was a violation of the Endangered Species Act and ordered that the wolves which had been reintroduced into that area be removed.<sup>21</sup> In 1998, the Ninth Circuit Court of Appeals disagreed in *United States v. McKittrick*,<sup>22</sup> holding that there was no such violation and the wolves in question could stay. Most recently, the Tenth Circuit Court of Appeals reversed Judge Downes's 1997 decision and vacated his order that the wolves be removed.<sup>23</sup> With similar cases having been litigated before courts in New Mexico<sup>24</sup> and North Carolina<sup>25</sup> in recent years, the problems associated with wolf-reintroduction are ripe for resolution.

For many wolves and humans alike, much is at stake as legislatures and courts ponder the emotionally charged issues involved in wolf-reintroduction cases. *McKittrick*,<sup>26</sup> the principal case in this Note, analyzed the issue of wolf-reintroduction efforts in Yellow-

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19. See generally Florangela Davila, *Gray Wolves' Return Hailed as Success, But Court Fight Continues*, SEATTLE TIMES, June 4, 1999, at A1 (reporting that the wide-ranging success of the wolf-reintroduction program has some ranchers concerned about the well-being of their livestock, and that those ranchers have taken their concerns to the federal courts).

20. 987 F. Supp. 1349 (D. Wyo. 1997), *rev'd*, 199 F.3d 1224 (10th Cir. 2000).

21. The United States District Court for the District of Wyoming is a Tenth Circuit district court. *United States v. McKittrick*, which disagrees with the result in *Wyoming*, is a Ninth Circuit Court of Appeals decision. The resulting disagreement created a split in the circuits, because *McKittrick* was powerless to overrule *Wyoming*.

22. 142 F.3d 1170 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).

23. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000).

24. See *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, No. 98-367M/JHG, 1999 U.S. Dist. LEXIS 19096 (D.N.M. Oct. 28, 1999) (holding that because the FWS has complied with all enumerated regulations and requirements in reintroducing Mexican gray wolves to New Mexico it may continue its reintroduction efforts).

25. See Sheehan, *supra* note 7, at A1 (reporting that in 1997 a lawsuit was filed in the United States District Court for the Eastern District of North Carolina in opposition to the continued implementation of red wolf recovery plans in North Carolina); James Eli Shiffer, *Red Wolves Win in Federal Court*, NEWS & OBSERVER (Raleigh), Dec. 30, 1998, at A3 (reporting that a verdict upholding the continuation of red wolf recovery plans in eastern North Carolina has been reached by a United States district court within that state and that an appeal of the decision is being planned); see also *Gibbs v. Babbitt*, 31 F. Supp. 2d 531 (E.D.N.C. 1998).

26. 142 F.3d 1170.

stone National Park and the Rocky Mountain northwest and the law that permits such reintroduction.

Part II of this Note gives a brief history of the plight of wolves in the United States, introduces the background and evolution of the law as it relates to the protection and reintroduction of endangered species in this country, and briefly addresses the history of wolf-reintroduction efforts in the Rocky Mountain northwest over the past twenty-five years. Part III gives the facts of *McKittrick* and explains the method and reasoning used by the Ninth Circuit in deciding that the wolves should be granted permanent asylum in Montana, central Idaho, and Yellowstone National Park. Part IV then analyzes the Ninth Circuit's decision, compares that decision with the Wyoming District Court's holding in *Wyoming*, argues that the Ninth Circuit was incorrect in its conclusion that the wolves have been legally reintroduced, and presents a solution for at least some of the problems associated with the wildlife-reintroduction issues currently being faced by a number of courts.<sup>27</sup> More specifically, the Note suggests that by effecting a change in the current law, the problems being litigated today, as well as similar problems that may arise in future wildlife-reintroduction settings, can be more amicably resolved. Finally, Part V summarizes the policies, issues, and answers presented herein.

## II. BACKGROUND

### *A. A Brief History of Wolves in the United States*

The wolf, which ancient myth and modern legend have fashioned into one of the world's most feared and reviled creatures, has a dark and miserable history throughout many parts of the world. The *Dillon Examiner* in 1921 called the wolf "a monstrosity of nature, possessing the cruelty and craftiness of Satan himself."<sup>28</sup> Many well-

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27. On appeal, the *Wyoming* decision was overturned. Thus, the suggestion in this Note that the Ninth Circuit decision allowing the wolves to remain in Yellowstone National Park and central Idaho was incorrect applies to the Tenth Circuit's reversal of *Wyoming* as well.

28. Robert C. Moore, *The Pack is Back: The Political, Social, and Ecological Effects of the Reintroduction of the Gray Wolf to Yellowstone National Park and Central Idaho*, 12 T.M. COOLEY L. REV. 647, 683 n.194 (1995) (citing *Ghost Wolves Return to Their Lair*, OBSERVER, Jan. 15, 1995, at 17). Another author, nature writer Barry Lopez, termed the wolf "the Devil, red tongued, sulfur breathed and yellow eyed." Sharon Begley et al., *Return of the Wolf*, NEWSWEEK, Aug. 12, 1991, at 44.



known children's stories and fairy tales such as *The Three Little Pigs* and *Little Red Riding Hood* portray wolves as cunning, vicious, and evil.<sup>29</sup> Even the Bible casts wolves in a negative light when it warns, "Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves."<sup>30</sup>

The extermination of wolves has long been supported by governments and their peoples throughout much of the world. As early as 300 B.C., the Irish were breeding wolfhounds specifically for the purpose of killing wolves in that country.<sup>31</sup> As a result of this and other human efforts, wolves had completely disappeared from Denmark (1772), Ireland (1821), and Great Britain (1848) before the beginning of the second half of the nineteenth century.<sup>32</sup> Central Europe all but finished off its wolf population by 1880,<sup>33</sup> and in 1868 the Japanese government lifted a long-time ban on the hunting of animals in that country, which quickly led to the complete extirpation of wolves from the island.<sup>34</sup> North America was not far behind

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29. In seventeenth and eighteenth century Europe, people had good reason to distrust wolves. Speaking of the historic tale of *Little Red Riding Hood*, one scholar wrote,

The direct forebears of Perrault's literary tale were not influenced by sun worship or Christian theology, but by the very material conditions of their existence . . . Little children were attacked and killed by animals . . . in the woods and fields. . . . There was a strong superstitious belief in werewolves . . . uncontrollable magic forces of nature, which threatened the lives of the peasant population.

FOLK & FAIRY TALES, 21 (Martin Hallett & Barbara Karasek eds., Broadview Press 1996) (quoting JACK ZIPES, THE TRIALS AND TRIBULATIONS OF LITTLE RED RIDING HOOD: VERSIONS OF THE TALE IN SOCIOCULTURAL CONTEXT 6-7 (1983)). Another author wrote,

Human antipathy toward *Canis lupus* dates back at least to the Middle Ages, when wolves feasted on human corpses during the Black Death . . . To American settlers, wolves often represented the "howling" wilderness, and at a time when a single night of predation could ruin a family, wolves were a constant reminder of the precariousness of frontier life. Theodore Roosevelt once spoke of the threat to progress posed by the wolf, calling him "the beast of waste and desolation."

Betsy Carpenter & Lisa Busch, *The Comeback Wolves*, U.S. NEWS & WORLD REP., Dec. 12, 1994, at 76.

30. *Matthew* 7:15 (King James).

31. See Inga Haagensohn Causey, Comment, *The Reintroduction of the Wolf in Yellowstone: Has the Program Fatally Wounded the Very Species it Sought to Protect?*, 11 TUL. ENVTL. L.J. 461, 462 (1998) (citing MAUREEN GREELEY, WOLF 104 (Susan Lauzau ed., 1997)).

32. See *id.*

33. See Oliver Klaffke, *The Company of Wolves*, NEW SCIENTIST, Feb. 6, 1999, at 18 (examining the nineteenth century extermination of wolves in central Europe and the controversy surrounding their recent comeback); see also Lucy Fisher, *Back on the Prowl*, TIME, Apr. 19, 1999, at 66 (reporting on the history of wolves in Europe and the problems accompanying their return).

34. See Kevin Short, *Japan's Lost Population of Wolves*, DAILY YOMIURI (Tokyo), Apr.

its European and Asian counterparts, as the mid-1800s saw the beginning of massive wolf-extirmination efforts in the United States.<sup>35</sup>

The massacre of wolves in the United States began as the numbers of farms and ranches—and the livestock housed on and around them—increased with America's nineteenth century expansion to the West.<sup>36</sup> An early method of killing wolves, employed in great earnest in the northern Rocky Mountain area, was to shoot bison and poison the abandoned carcasses, which wolves would consume; between 1870 and 1877, approximately 385,000 wolves were killed by this method.<sup>37</sup> In 1883, Montana became the first territory to offer a bounty for the killing of any predator, including wolves; between 1883 and 1918, approximately 80,730 wolves were killed for bounty in Montana, and by 1926 wolves were reportedly eliminated from the state all together.<sup>38</sup> A similar program was enacted in Idaho in the early 1900s with similar results.<sup>39</sup> Even in Yellowstone National Park, where wild animals were supposed to be protected, the killing of wolves by none other than park officials continued until 1926.<sup>40</sup> As a result of these and other nationwide efforts, the wolf was gone from the majority of the eastern United States by 1900, and by 1926 it was gone from the Great Plains.<sup>41</sup> Washington State finished off its wolves by 1940, and Colorado and Wyoming finished off theirs by 1943.<sup>42</sup> By the middle of the twentieth century, the wolf had been

13, 1999, at 11 (summarizing the history of wolf extermination on the island of Japan).

35. See Causey, *supra* note 31, at 462. See also Doremus, *supra* note 14, at 6.

36. Gibeaut notes,

When Europeans began colonizing North America in the 16th century, wolves ranged throughout present-day Canada and the United States, with the Mexican gray wolf . . . extending well south of the Rio Grande. . . . But as the European version of civilization pushed westward, predators and livestock proved a fatal mix—for the predators.

Gibeaut, *supra* note 1, at 57.

37. See Bert Lindler, *Early Visitors Impressed by Numbers*, GREAT FALLS TRIB., May 10, 1990, at 6B.

38. See Timothy B. Strauch, *Holding the Wolf by the Ears: The Conservation of the Northern Rocky Mountain Wolf in Yellowstone National Park*, 27 LAND & WATER L. REV. 33, 40 n.46 (1992) (citing FISH AND WILDLIFE ENHANCEMENT, U.S. FISH AND WILDLIFE SERVICE., WOLF RECOVERY IN MONTANA, 1989 ANN. REP. 1).

39. See *id.* at 41 (citing IDAHO DEPT. FISH & GAME, GRAY WOLF: HISTORY, PRESENT STATUS, AND MANAGEMENT RECOMMENDATIONS (1981)).

40. See *id.* at 42-43.

41. See Causey, *supra* note 31, at 462 (citing MAUREEN GREELEY, WOLF 108 (Susan Lauzau ed., 1997)).

42. See *id.*

completely eradicated from almost ninety-five percent of its original habitat within the borders of the contiguous forty-eight states.<sup>43</sup> Only in Canada and Alaska has the Rocky Mountain gray wolf continued to thrive.<sup>44</sup>

*B. The Endangered Species Act of 1973*

In December of 1973, the decimated wolf populations in the United States won a major victory when Congress enacted the Endangered Species Conservation Act (ESA) in response to general concern over the depletion and possible extinction of fish, wildlife, and plants in the United States.<sup>45</sup> The stated purpose of the Act is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such . . . species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [the Act.]”<sup>46</sup> In further defining the scope of the Act, in 1978 the United States Supreme Court held that the Act’s essential purpose is to conserve endangered species at any cost.<sup>47</sup>

The ESA defines an endangered species as one “which is in danger of extinction throughout all or a significant portion of its range.”<sup>48</sup> A threatened species is one “which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>49</sup> Significant protections are afforded those species which the Act lists as endangered or threatened.<sup>50</sup>

The northern Rocky Mountain Wolf (*canis lupus irremotus*), a

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43. *See id.*

44. *See* Gibeaut, *supra* note 1, at 57 (“By the early 20th century. . . wolves and grizzlies had been all but exterminated in the lower 48 states. Outside of Alaska and Canada, they now exist on their own only in isolated pockets.”).

45. *See* 16 U.S.C. §§ 1531-44 (1973) (amended 1982).

46. § 1531(b).

47. *See* *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). In *Tennessee* the United States Supreme Court affirmed a Sixth Circuit decision to enjoin the completion of the multi-million dollar Tellico Dam project because it thought the completion would cause the destruction and extinction of the snail darter, a small fish listed by the ESA as endangered.

48. § 1532(6).

49. § 1532(20).

50. *See* §§ 1538-39 (listing protections given species listed as threatened or endangered under the ESA); *see also infra* notes 58-61 and accompanying text for a more detailed explanation of the protections afforded threatened and endangered species respectively.

major target and victim of the late-1800s' wolf massacres, was listed in the original act as an endangered species, and as such was given full protection under the ESA.<sup>51</sup> In 1978, the entire species of *canis lupus* was listed as endangered in each of the forty-eight contiguous states except for Minnesota, the state with the largest wolf population, where it was listed only as threatened.<sup>52</sup>

The 1973 Act also allowed for reintroduction of a listed species into portions of its historic range then unoccupied by naturally occurring members of the species. Although this provision was a victory for the decimated wolf populations, its power was limited, and, as a result, early reintroduction efforts failed.<sup>53</sup> Concerned that these efforts had been largely unsuccessful, Congress expanded the power of government agencies to reintroduce various animal species to their historic habitats in its 1982 amendments to the ESA, which "made significant changes" to the 1973 Act.<sup>54</sup> These changes included the addition of section 10(j), which provides for the designation of specific animals as "experimental" in an attempt to give the Secretary of Interior greater flexibility in working towards the conservation of endangered species.<sup>55</sup> This provision, which also allows for the reintroduction of listed species into their historic habitats, is at the heart of the controversy in current wolf-reintroduction litigation.<sup>56</sup>

### *1. Experimental populations under section 10(j) of the 1982 amended ESA*

Under the amended ESA, a listed species such as the northern Rocky Mountain gray wolf that is "reintroduced outside of its current range, but within its historic range, may be designated, at the

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51. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1353 (D. Wyo. 1997), *rev'd*, 199 F.3d 1224 (10th Cir. 2000). See generally Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.11 (1998).

52. See *Wyoming*, 987 F. Supp. at 1353. For a review of the basic legal issues that have arisen over the past 30 years regarding the Minnesota wolf populations, see Brian B. O'Neill, *The Law of Wolves*, 18 ENVTL. L. 227 (1988).

53. See Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,252 (1994) (to be codified at 50 C.F.R. pt. 17).

54. *Id.*

55. See *id.* Since 1982, section 10(j) has remained unchanged. Additionally, no currently proposed litigation seeks to change this section.

56. Section 10(j) of the amended ESA is codified at 16 U.S.C. § 1539(j) (1982).

discretion of the Secretary of the Interior . . . , as ‘experimental.’”<sup>57</sup> The rules regarding these designations are set forth in section 10(j).

*a. Proper treatment of experimental populations.* The amended ESA requires that, unless special enumerated exceptions apply, all experimental populations be treated as threatened species, and not as endangered species.<sup>58</sup> Because the experimental populations are considered threatened as opposed to endangered, the rules regarding their protection and proliferation are not as strict as they otherwise would be. As such, the Fish and Wildlife Service, the administrative agency primarily responsible for implementing reintroduction efforts, has greater flexibility and discretion in managing and maintaining the reintroduced species and in fashioning rules and laws regarding them than it would have if the animals were given full ESA protection as endangered species.<sup>59</sup> Thus, the FWS can, for example, establish a pack of protected wolves in a particular area but still allow ranchers to kill any of those experimental wolves caught in the act of attacking their livestock. If the experimental wolves were given full ESA protection as an endangered species, such killing would be illegal and would result in a criminal prosecution of the ranchers, effectively leaving them helpless to defend their livestock.<sup>60</sup> The FWS also has more discretion in relocating troublesome experimental wolves to remote areas when they clash with humans than it would have if naturally occurring wolves were the cause of the trouble.<sup>61</sup>

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57. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. at 60,252.

58. See § 1539(j)(2)(C). See also Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.82 (1998).

59. See generally § 1539(j)(2)(C). See also Gibeaut, *supra* note 1, at 57 (“The experimental designation gives the government more flexibility in dealing with local property owners, because it permits removing and even killing animals that threaten livestock or other property. Such measures are nearly impossible when animals are listed as endangered.”).

60. See generally 16 U.S.C. §§ 1532, 1538 (1973) (amended 1982). Because ranchers and farmers must actually catch the experimental wolf in the act of killing livestock, many believe that the provisions which allow them to kill such wolves are of only marginal value. See Gibeaut, *supra* note 1, at 58.

61. The rules for dealing with troublesome wolves are set forth in the Final Rules for establishment of an experimental population in Yellowstone National Park. See Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. at 60,257.

*b. Essential and nonessential experimental designations.* Under the 1982 Amendments, the Secretary of the Interior must determine whether experimental populations are “essential to the continued existence of an endangered species or a threatened species.”<sup>62</sup> This designation also affects the level of protection afforded the experimental population. Those populations designated as “essential” are given full ESA protection at all times (even though they are listed as threatened species), meaning killing a member of the species for any reason, even if they are caught in the act of killing livestock, is unlawful. Those designated as “nonessential” only receive such protection within the borders of any area of the National Wildlife Refuge System or the National Park System. Under this complex system of rules, for example, an experimental wolf population that is deemed nonessential to the continued survival of the species as a whole and is introduced in the northern Rocky Mountain area receives full ESA protection while inside the borders of Yellowstone National Park but only receives protection as a threatened species outside of the Park. That is, when they are outside the Park, ranchers can kill wolves that are caught in the act of attacking livestock, and wildlife officials have more discretion and leeway in managing their existence.<sup>63</sup> Such is the case with the wolves at issue in *McKittrick*; they were designated as nonessential experimental wolves by the Secretary of Interior prior to their release into the wilds of Yellowstone in 1995.<sup>64</sup>

*c. The “wholly separate geographically” requirement and the purpose behind it.* The 1982 Amendments to the ESA also state that animal populations are to be deemed experimental “only when, and at such times as, the population is *wholly separate geographically* from nonexperimental populations of the same species.”<sup>65</sup> The interpretation given to this ambiguous phrase is of great importance to the litigation over the reintroduction of Canadian gray wolves into the Yellowstone and central Idaho areas, because it is the key to the legality of designating those populations as experimental. More specifically, the district court in *Wyoming* and the appellate court in *McKittrick* each gave the phrase a different meaning, and as a result,

62. § 1539(j)(2)(B); *see also* Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.80.

63. *See* Doremus, *supra* note 8, at 50.

64. *See* Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.84.

65. § 1539(j)(1) (emphasis added); *see also* Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.80.

reached different conclusions on the legality of the wolves' existence.

With regard to wolf-reintroduction litigation, the major purpose behind the "wholly separate geographically" requirement of section 10(j) of the amended ESA is to preserve the integrity of naturally occurring animal populations and, if possible, to allow them to continue to expand and grow on their own, without outside influence or intervention. For example, in 1986, wildlife officials discovered that a pack of Canadian gray wolves had recolonized an area in the northern Montana wilderness near Glacier National Park and the Canadian border.<sup>66</sup> As such, recent efforts to reintroduce wolves to the northern Rocky Mountain area have been made only as far north as Yellowstone National Park and the Frank Church River of No Return Wilderness area in central Idaho. Because these areas are hundreds of miles from Glacier National Park, wildlife officials hope that the reintroduction of wolves to these locations will not interfere with the possibility of a natural southward expansion of the northern Montana pack.

## *2. The legislative history of amended ESA section 10(j)*

The legislative history of section 10(j) gives hints as to what the controversial phrase "wholly separate geographically" means. The House Report on the proposed 1982 amendments to the Endangered Species Act, published on May 17, 1982, sets forth the thinking of Congress on the interaction of experimental populations introduced to areas within their historic range under section 10(j) and naturally occurring populations of the same species:

To qualify for the special treatment afforded experimental populations, a population must have been authorized by the Secretary [of Interior] for release *outside the current range of the species*. . . . The Committee carefully considered how to treat introduced populations that overlap, in whole or in part, natural populations of the same species. To protect natural populations and to avoid potentially complicated problems of law enforcement, the definition [of an experimental population] is limited to those introduced populations that are *wholly separate geographically* from nonexperimental populations of the same species. . . . If an introduced population

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66. See Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. at 60,256.

overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times, the introduced population is to be treated as an experimental population at such times as it is wholly separate. The Committee intends, however, that such a population be treated as experimental only when the times of geographic separation are reasonably predictable and not when separation occurs as a result of random and unpredictable events.<sup>67</sup>

Again, courts have interpreted this passage and the phrase “wholly separate geographically” inconsistently. The district court in *Wyoming* held the phrase to mean that any interaction, even between lone wanderers from distant populations, violates the requirement.<sup>68</sup> *McKittrick* was not so strict.<sup>69</sup> The interpretation of “wholly separate geographically” given by each of the courts that have ruled on the issue of the legality of experimental populations in Yellowstone and central Idaho has been the key issue in the courts’ determinations of whether the wolves were reintroduced in violation of the ESA.

*C. The Beginning (and End?) of Wolf Reintroduction in the United States*

With the power of the amended ESA behind him, the Secretary of Interior, in conjunction with the FWS and other government entities, has made efforts over the last seventeen years to reintroduce wolves to areas throughout the contiguous forty-eight states that are within their historic, but outside their current, ranges.

*1. Wolf reintroduction in Yellowstone National Park and central Idaho*

In the late 1970s, in accordance with section 1533(f) of the ESA, the Department of Interior organized a team of individuals to craft a recovery plan for the northern Rocky Mountain wolf. The Northern Rocky Mountain Wolf Recovery Plan was completed in

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67. H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833 (emphasis added).

68. See *Wyoming Farm Bureau Fed’n v. Babbitt* 987 F. Supp. 1349, 1373-74 (D. Wyo. 1997), *rev’d*, 199 F.3d 1224 (10th Cir. 2000).

69. See *United States v. McKittrick*, 142 F.3d 1170, 1175 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).



1980 and updated in 1987.<sup>70</sup> The 1987 Plan concluded that, in order for the species to recover in those areas of the western United States from which it had been previously extirpated, a population of approximately three hundred wolves would be needed.<sup>71</sup> Natural recovery was suggested for Idaho and Montana—two of the three designated recovery areas—and the creation of a nonessential experimental population under section 10(j) of the ESA was recommended for the Yellowstone area.<sup>72</sup>

Following completion of the Northern Rocky Mountain Wolf Recovery Plan, the United States Fish and Wildlife Service, in cooperation with other government agencies, prepared an Environmental Impact Statement, which was issued in its final form in May of 1994.<sup>73</sup> In the Statement, the Fish and Wildlife Service recommended the creation of two nonessential experimental populations for the central Idaho and Yellowstone areas. The plan proposed that fifteen wolves, including breeding pairs, be reintroduced to Yellowstone National Park each year beginning in 1994.<sup>74</sup> The same recommendation was made for the central Idaho recovery area.<sup>75</sup>

On June 15, 1994, Bruce Babbitt, Secretary of Interior, signed a Record of Decision and Statement of Findings on the Environmental Impact Statement for the Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho, which more or less adopted the Fish and Wildlife Service's proposal that experimental populations be created in these areas.<sup>76</sup> The Final Rules, which allowed for the release of ninety to one hundred fifty Canadian gray wolves into Yellowstone and Idaho over a three- to five-year period, were published on November 22, 1994.<sup>77</sup> In 1995, following publication of the Final Rules, wolf reintroduction by means of the establishment of experimental populations of Canadian gray wolves began in the central Idaho and Yellowstone experimental population areas.

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70. *See Wyoming*, 987 F. Supp. at 1353-54.

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See* Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252 (1994) (to be codified at 50 C.F.R. pt. 17).

*2. The halting of the Yellowstone and central Idaho reintroduction efforts*

Efforts toward gray wolf reintroduction into Yellowstone and central Idaho, which for two years had been progressing at a rate satisfactory to the Department of Interior, took a major blow in December of 1997, when United States District Judge William F. Downes ruled in *Wyoming Farm Bureau Federation v. Babbitt*<sup>78</sup>—a consolidation of three separate lawsuits each directly challenging the legality of the experimental wolf populations in Yellowstone National Park and central Idaho—that wolf-reintroduction efforts in Yellowstone and central Idaho were unlawful and in violation of section 10(j) of the amended ESA.<sup>79</sup> Based on his reading of the legislative history, Judge Downes ruled: (1) because the reintroduced experimental populations overlapped geographically with naturally occurring wolf populations—wolves having been confirmed to exist within the geographic boundaries of the experimental areas in Yellowstone National Park and central Idaho<sup>80</sup>—reintroduction efforts violated section 10(j); (2) the treatment that the FWS had thus far given to the reintroduced wolves was improper; and (3) the reintroduced

78. 987 F. Supp. 1349 (D. Wyo. 1997), *rev'd*, 199 F.3d 1224 (10th Cir. 2000).

79. *See id.* at 1376. The plaintiffs in *Wyoming* were the Wyoming, Montana, and Idaho Farm Bureau Federations, James R. and Cat D. Urbigkit, and the National Audubon Society and some conservation groups aligned with the Audubon Society. The United States and various government agencies were defendants in the consolidated action.

80. Lone wolves and, in some reports, breeding pairs have been confirmed to exist within the experimental population areas in Yellowstone and central Idaho. *Id.* at 1353; *see also* Eugene Linden, *Search for the Wolf*, TIME, Nov. 9, 1992, at 66 (reporting that in 1992, three years before reintroduction efforts began, “[r]angers and visitors reported seeing paw prints and even groups of wolves” within the borders of Yellowstone National Park, and “a gray-black 42-kg (92-lb.) male [wolf] . . . was shot while supposedly traveling with a group of three or four animals just south of the park in the Teton Wilderness Area”); John Andrew Zuccotti, *A Native Returns: The Endangered Species Act and Wolf Reintroduction to the Northern Rocky Mountains*, 20 COLUM. J. ENVTL. L. 329, 333 (1995) (reporting that DNA tests of the aforementioned 92-lb. animal linked it to Montana wolf populations); Alexander Cockburn, *The Wolf’s Tale*, NATION, Jan. 12, 1998, at 9 (“[N]ative wolves have never disappeared from the Northern Rockies. . . . A memo from the Fish and Wildlife Service in the early nineties estimated that there were at least five pairs in Idaho and furnished a map recording more than a hundred sightings of wolves in Idaho since the mid-seventies. In Yellowstone, a year before the Canadian wolves were imported, a wolf was shot and killed a few miles south of the Park.”); Begley, *supra* note 28, at 44 (“Packs from Montana’s Glacier National Park, recent immigrants from Canada, are migrating south along old logging trails. So far, they’ve reached western Montana, where 40 to 50 wolves now roam [in 1991], and central Idaho, where there are 10 to 20.”).

wolves and their offspring would need to be removed from the experimental areas.<sup>81</sup> Since wildlife officials were unable to find a zoo or animal park willing to take the wolves, and because Canada—the land of their origin—was unwilling to take them back, the Judge's order was effectively a death sentence for the reintroduced wolf populations.<sup>82</sup>

### 3. *A pro-wolf reversal by the Tenth Circuit*

The defendants in *Wyoming* appealed the district court's decision to the Tenth Circuit Court of Appeals and the Wyoming district court judge's order was stayed pending the outcome of that appeal.<sup>83</sup> On January 13, 2000, the Tenth Circuit Court of Appeals reversed the district court's decision in *Wyoming*.<sup>84</sup> In reversing the district court, the Tenth Circuit held: (1) there was no overlap between the experimental and naturally occurring wolf populations and thus no violation of the "wholly separate geographically" requirement of section 10(j); (2) the treatment that the FWS had thus far given to the reintroduced wolves was proper; and (3) the reintroduced wolves and their offspring should not be removed from the experimental areas.<sup>85</sup>

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81. See *Wyoming*, 987 F. Supp. at 1376. See generally Michael Milstein, *Wolves are Thriving—Except in Court*, BOSTON GLOBE, Nov. 30, 1998, at C1 (reporting that "the judge, 'with the utmost reluctance,' declared that the program had indeed illegally downgraded protection for wolves because it would cover not just reintroduced wolves").

82. See Causey, *supra* note 31, at 473; see also Jeffrey Kluger, *The Big (Not So Bad) Wolves of Yellowstone*, TIME, Jan. 19, 1998, at 22 (reporting that, as a result of Judge Downes's decision, the reintroduced Yellowstone wolves may have to be killed); *The Wolf Finds a Home*, L.A. TIMES, July 4, 1998, at B7 ("Wolf program supporters, including the Defenders of Wildlife and the U.S. Fish and Wildlife Service, say there is no practical way of removing the wolves without shooting them.").

83. After Judge Downes handed down his order that the wolves be removed, some wildlife conservation groups pledged, if necessary, to appeal the legality of reintroduced-wolf populations to the United States Supreme Court. See Milstein, *supra* note 81.

84. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1235-39, 40 (10th Cir. 2000). For reaction to the Tenth Circuit's decision, see *Court Says Wolves Can Stay*, DESERET NEWS (Salt Lake City), Jan. 14, 2000, at A1; Gary Gerhardt, *Wolves Get Reprieve from Circuit Court*, DENVER ROCKY MOUNTAIN NEWS, Jan. 14, 2000, at 7A; Kit Miniclier, *Park Wolves Win One in Court*, DENVER POST, Jan. 14, 2000, at B-01; *U.S. Court Says Gray Wolves Can Stay in Yellowstone*, SAN DIEGO UNION-TRIB., Jan. 14, 2000, at A-14; *Wolves Can Stay in Yellowstone, Court Says*, CHI. TRIB., Jan. 14, 2000, at 10.

85. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1235 (10th Cir. 2000).

III. *UNITED STATES V. MCKITTRICK*

In 1998, just a few months after the publication of the district court's *Wyoming* decision, and approximately two years before the Tenth Circuit reversal of that decision, the issue of wolf reintroduction was brought before the Ninth Circuit Court of Appeals. In *United States v. McKittrick*,<sup>86</sup> the Ninth Circuit reached a conclusion opposite to that reached by the district court in *Wyoming*, ruling that the wolf-reintroduction efforts in Yellowstone National Park and central Idaho were legal and that there had been no violation of the "wholly separate geographically" requirement of section 10(j) of the amended ESA.<sup>87</sup> Indirectly, and perhaps most importantly, the court also held that the wolves constituting the experimental populations should not be removed from Yellowstone or central Idaho, but should be allowed to remain.<sup>88</sup>

A. *The Facts*

In October of 1995, Montana resident Chad Kirch McKittrick was sentenced to six months in prison by a magistrate judge after a federal jury found him guilty on three criminal counts relating to the shooting and killing of a gray wolf, known to reintroduction officials as Wolf Ten, in the Red Lodge, Montana, wilderness area.<sup>89</sup> Wolf Ten was a member of the experimental population of wolves reintroduced to the Yellowstone recovery area between 1995 and 1997. The United States District Court, District of Montana, later affirmed both the conviction and the prison sentence, and McKittrick ap-

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86. 142 F.3d 1170 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).

87. *Id.* at 1178 ("We hold that the regulations protecting the gray wolf experimental population are valid . . .").

88. *See id.* The wolves at issue in *McKittrick* were the same wolves that were at issue in *Wyoming*. The Ninth Circuit had jurisdiction over the wolves because some of the animals released into Yellowstone National Park made their way into Montana. Yellowstone National Park is located primarily within the borders of the state of Wyoming, which in turn is located within the geographic boundaries of the Tenth Circuit. Montana, however, is located within the geographic boundaries of the Ninth Circuit. Therefore, since the experimental wolves consistently wandered to and from Montana and Wyoming, both circuits had jurisdiction over the animals.

89. McKittrick was charged specifically with taking a wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(3); possessing a wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(5); and transporting the wolf in violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(1) and 3373(d)(2). *See McKittrick*, 142 F.3d at 172-73.

pealed to the Ninth Circuit Court of Appeals. His appeal was heard, and the lower court's rulings were affirmed in part, reversed in part, and remanded in the spring of 1998.<sup>90</sup> The reversal and remand had nothing directly to do with the wolves or their reintroduction to Yellowstone National Park, but dealt solely with the issue of acceptance of responsibility as a mitigating factor in sentencing under the federal sentencing guidelines.<sup>91</sup>

As for the wolf, McKittrick argued on appeal that the wolf he had killed was not protected under the Endangered Species Act.<sup>92</sup> More specifically, McKittrick pled that the Yellowstone wolf population was illegally reintroduced in violation of section 10(j) of the ESA, arguing that the Fish and Wildlife Service improperly drew members of the experimental population from an unlisted population of Canadian gray wolves. He further argued that the designation of the population as experimental was invalid because it was not "wholly separate geographically" from natural populations of wolves occurring in the area.<sup>93</sup> The court took up these issues and eventually held that McKittrick's claims with respect to Wolf Ten and the experimental populations were without merit.

### *B. The Court's Reasoning*

Like Judge Downes's decision in *Wyoming*, the holding in *McKittrick* hinged on the court's interpretation of section 10(j) of the amended ESA and the "wholly separate geographically" requirement contained therein.

#### *1. The Ninth Circuit view of the experimental population designation*

One of McKittrick's main claims on appeal was the invalidity of the designation of the Yellowstone wolves as experimental populations. McKittrick's claim was based on the fact that the wolves used to repopulate the Yellowstone and central Idaho areas were Canadian

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90. See *McKittrick*, 142 F.3d at 1178-79.

91. See *id.* at 1178 ("We vacate and remand the sentence, however, for a redetermination of whether McKittrick satisfied his burden to show acceptance of responsibility under U.S.S.G. § 3E1.1.").

92. See *id.* at 1173.

93. McKittrick argued that there was overlap based upon the fact that lone wolves from naturally occurring areas to the north had been spotted in the Yellowstone and central Idaho experimental population areas.

gray wolves, and not members of a listed population, or a population listed under the ESA as endangered.<sup>94</sup> Section 10(j) of the amended ESA provides in part, “The Secretary may authorize the release . . . of any population . . . of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.”<sup>95</sup> Under McKittrick’s reading of the statute, in creating experimental populations the Secretary of Interior was restricted “to drawing members of experimental populations from populations already listed under the ESA.”<sup>96</sup> In other words, McKittrick argued that, in order to meet the requirements set forth in the statute, the experimental wolf populations should have been created out of populations of gray wolves already existing within the borders of the United States because it is here, not Canada, that they are currently endangered and listed under the ESA. The court summarily dismissed this argument on two grounds.

First, the court explained that a species is protected by the ESA based on where it is found and not where it originates.<sup>97</sup> This means, as the court explained, that the reintroduced Canadian wolves became members of an endangered species as soon as they entered the United States. The fact that they were from Canada—a place where gray wolves thrive—makes no difference to their being protected in the United States.<sup>98</sup> In support of this proposition, the court pointed to the Final Rules for the reintroduction of experimental wolves into the Yellowstone area, which discusses the previously documented and likely further expansion of the Canadian wolf population from Canada into Glacier National Park, a place where wolves are protected.<sup>99</sup> It is clear from these rules, the court argued, that the south-

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94. *See McKittrick*, 142 F.3d at 1173. McKittrick argued that because the ESA only lists species endangered within the borders of the United States, there is no way that the Canadian wolves used in the creation of the Yellowstone experimental populations could be on the list.

95. 16 U.S.C. § 1539(j)(2)(A) (1982); *see also* Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.81 (1998).

96. *McKittrick*, 142 F.3d at 1173.

97. *See id.*

98. *See* Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252 (1994) (to be codified at 50 C.F.R. pt. 17) (stating that the use of Canadian gray wolves is proper and will not reduce the likelihood of survival of the species in the Canadian wild).

99. *See generally id.* at 60,253.

ern expansion of those populations is expected and encouraged. It would make no sense, the court then intimated, to withhold protection from the wolves moving south from Canada when they enter the borders of the Park.<sup>100</sup> To withhold protection would be to defeat the purpose of the laws that give the protections in the first place, because members of a species listed under the ESA as endangered would receive no ESA protection. The same principle applies, the court held, when members of any endangered species are intentionally transported into the United States.<sup>101</sup> Naturally then, the court held, instantaneous protection applies itself when wolves are brought across the Canadian border into the United States for the purpose of reintroduction.<sup>102</sup>

Second, in support of its denial of McKittrick's claim that the wolves were improperly drawn from Canadian populations, the court looked to the general nature and purpose of the ESA. As the court pointed out, the essential purpose of the ESA is the conservation of endangered species.<sup>103</sup> Bringing wolves from Canada into the United States for reintroduction, the court reasoned, effects this explicit purpose. Further, the *McKittrick* court reasoned that the legislative history of the amended ESA gives the Secretary of Interior great latitude in implementing plans designed to effect the goals of the ESA, and importing wolves from Canada is within the bounds of that latitude.<sup>104</sup> Finally, the court stated that great deference should be given to the actions, views, and decisions of administrative agencies responsible for carrying out laws and regulations that come under their purview.<sup>105</sup> Thus, the court held, "the agency's implemen-

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100. See *McKittrick*, 142 F.3d at 1173-74; see also *Ramsey v. Kantor*, 96 F.3d 434, 438 (9th Cir. 1996) (holding that many "legal regimes" for protected salmon apply to the fish throughout the course of their migration). But see *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1235 n.4 (10th Cir. 2000) (stating that in certain enumerated situations some animals may, under federal law, lose ESA protections when they either enter or leave a particular geographic area).

101. See *McKittrick*, 142 F.3d at 1173-74.

102. See *id.* at 1174.

103. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

104. See *McKittrick*, 142 F.3d at 1174 (citing H.R. REP. NO. 97-567, at 33 (1982), reprinted in 1983 U.S.C.C.A.N. 2807, 2833).

105. See *Rainsong, Co. v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997), cert. denied \_\_U.S.\_\_, 120 S. Ct. 43 (1999). See generally *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that when an administrative agency is charged with administering an ambiguous statutory provision, its reasonable interpretation of that provision is entitled to deference); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568,

tation of section 10(j) in creating the experimental wolf population effectuates the ESA's purpose and is within the Secretary's authority. FWS's designation of the experimental population was proper, and the wolf McKittrick shot fell within the ESA's protection."<sup>106</sup>

*2. The Ninth Circuit view of the "wholly separate geographically" requirement*

In *McKittrick*, the Ninth Circuit also addressed the nature of the "wholly separate geographically" requirement of section 10(j) of the amended ESA because another of McKittrick's claims on appeal was the invalidity of the experimental population designation based on a lack of complete separation between the experimental wolves and individual members of the naturally occurring populations. To put it another way, McKittrick claimed that the "wholly separate geographically" requirement of section 10(j) was not met, and the experimental population was therefore improperly and unlawfully in existence. This claim was based on "sporadic sightings of isolated indigenous wolves in the release area."<sup>107</sup> The court disagreed with McKittrick's claim based on its reading of the legislative history and the definition of "population" that it derived therefrom.

In reaching its decision, the *McKittrick* court deferred to the FWS's definition of "population" as being "at least two breeding pairs of gray wolves that each successfully raise at least two young to December 31 of their birth year for two consecutive years," holding that the FWS's acceptance of this definition was not a violation of *Chevron*.<sup>108</sup> Based on this definition, the court ruled that lone wolves

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1571 (9th Cir. 1993) (holding that the decision of an administrative agency with regard to the interpretation of a statutory provision it is charged with administering is given particular deference when the implementation of the provision requires agency expertise). *But see* United States v. Shimer, 367 U.S. 374, 383 (1961) (explaining that an administrative agency's interpretation of an ambiguous statutory provision is not entitled to deference when "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned") (emphasis added).

106. *McKittrick*, 142 F.3d at 1174.

107. *Id.* at 1175.

108. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,256 (1994) (to be codified at 50 C.F.R. pt. 17). *See also* *McKittrick*, 142 F.3d at 1175. The court also makes reference to a population as being "a group of fish or wildlife . . . in common spatial arrangement that interbreed when mature." *Id.* (citing Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.3 (1999)). At least one author would agree with the court's acceptance of the FWS's definition of "population."



do not constitute a population under the statute. The court further ruled that the existence of lone wolves in the range of experimental populations does not violate the “wholly separate geographically” requirement because two successfully breeding pairs from each group never came into contact with one another.<sup>109</sup> McKittrick’s second claim was thus ruled invalid and his appeal on that issue dismissed.<sup>110</sup>

*3. A rebuke of the Wyoming view on the legality of experimental wolf populations*

In Part II(A)(2) of its opinion, the *McKittrick* court specifically addressed the 1997 district court decision reached by Judge Downes in *Wyoming* and what it saw to be the flaws in the reasoning employed by the *Wyoming* court in reaching its decision. The *McKittrick* court wrote,

We do not agree with the Wyoming District Court’s analysis that section 10(j) must be read to apply to individual specimens as well as populations. The court based its reading on a House Report containing the word “individuals” once and “specimens” twice. The quoted section of the report, however, uses the word “population” or “populations” sixteen times, and section 10(j) itself refers only to populations. We must defer to FWS’s reasonable interpretation of section 10(j), particularly where the interpretation involves agency expertise. FWS has interpreted the “wholly separate geographically” requirement only to apply to populations; this interpretation is reasonable and we decline to disturb it.<sup>111</sup>

Thus, the court disagreed with the ruling in *Wyoming*, holding that the designation of the wolves as an experimental population is legal and the order removing them improper. Because the *Wyoming* removal order came from a district court in the Tenth Circuit, how-

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*See* Zuccotti, *supra* note 80, at 357-58 (“The agency has read the term, in this case, to require, as previously stated, the presence of a population of two breeding pairs of wolves who produced two offspring in the previous two years. This interpretation appears to be sufficiently in agreement with the statutes so as to pass *Chevron* analysis, especially in the absence of any other guiding language as to the term’s meaning.”) (footnotes omitted).

109. *See McKittrick*, 142 F.3d at 1175.

110. In reversing the 1997 Wyoming district court’s ruling that the Yellowstone and central Idaho experimental populations are illegally in existence, the Court of Appeals for the Tenth Circuit relied on the same definition of “population” that *McKittrick* relied on in making its decision. *See Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1234 n.3 (10th Cir. 2000).

111. *McKittrick*, 142 F.3d at 1175 (citations omitted).

ever, the *McKittrick* court was powerless to overrule it. The court had to settle for disagreeing and stating its reasons for doing so.

#### IV. ANALYSIS

The major difference between the district court's decision in *Wyoming* and that reached by the *McKittrick* court relates to the interpretations given to the phrase "wholly separate geographically" by the respective courts. The *Wyoming* court held that "wholly separate geographically" means total and complete separation of the experimental population and naturally occurring populations, including a complete lack of interaction between individual specimens from each group.<sup>112</sup> The *McKittrick* court, in contrast, held that section 10(j) is not violated when lone wolves from a naturally occurring population enter an area designated specifically for experimental populations or, impliedly, vice versa.

A close analysis of section 10(j) shows that the *McKittrick* court was, in fact, incorrect in its construction of the law and in its interpretation of "wholly separate geographically." It naturally follows, then, that the district court in *Wyoming* was correct in holding that the experimental wolf populations in Yellowstone National Park and central Idaho are illegal in that, because they overlap with naturally occurring populations of the same species, they have been created in violation of the very statute that allows their existence.

The fact that the district court's decision in *Wyoming* was correct does not bode well for the reintroduced wolf populations. Indeed, the result of the *Wyoming* decision, if it is reinstated by a higher court, is a probable death sentence for those particular experimental populations. If the experimental wolves are removed or killed, however, fault does not lie with the *Wyoming* court, for it was simply applying the law as intended by Congress. Nor does it lie with the Fish and Wildlife Service, the Department of Interior or its Secretary, or

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112. In deciding not to give deference to the Fish and Wildlife Service's definition of "population," the *Wyoming* court relied on *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States v. Shimer*, 367 U.S. 374 (1961). *Shimer* held that an administrative agency's interpretation of an ambiguous statutory provision is not entitled to deference from a court when "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 383 (emphasis added). Based on its reading of the legislative history, the court felt that the FWS's definition was beyond what Congress would have allowed. See *Wyoming Farm Bureau Fed'n v. Babbitt*, 987 F. Supp. 1349, 1371 (D. Wyo. 1997).

with any of the other individuals or agencies charged with carrying out section 10(j) of the amended ESA. Any fault or blame lies with the law itself. The law has serious flaws that have caused genuine problems when applied to real-world situations like that of the Yellowstone wolf, and it is not unlikely that the same flaws will continue to cause problems in future reintroduction attempts.

As it now stands, the Tenth Circuit having overruled the *Wyoming* district court and the Ninth Circuit's ruling in *McKittrick* standing intact, it is unlikely that the Yellowstone and central Idaho wolves will be removed. However, the law remains flawed, and if future reintroduction efforts with other controversial or noncontroversial species are to be successful, Congress needs to take a serious look at section 10(j) of the amended ESA and make some changes.<sup>113</sup> With a few minor adjustments, the law can result in a better outcome than is now potentially available for those in favor of reintroduction, those opposed to reintroduction, and for the wolves themselves. Finally, and perhaps most important, the changes will also result in a more positive atmosphere for future reintroduction efforts, relieving them of the legal problems that have haunted the Yellowstone and central Idaho wolves over the past five years.

*A. McKittrick's Erroneous Reading of Section 10(j)'s "Wholly Separate" Requirement*

Part II(A)(2) of the *McKittrick* opinion, entitled "The 'Wholly Separate Geographically' Requirement," begins with a correct statement of both the current law, which permits the creation of experimental populations, and two of the major policy reasons behind that law. The court writes, " 'To protect natural populations and to avoid potentially complicated problems of law enforcement,' the statute requires that a population qualifies as a section 10(j) experimental population 'only when, and at such times as, the population is *wholly separate geographically* from nonexperimental populations of the same species.' "<sup>114</sup> In other words, the law seeks the protection of naturally occurring populations and the avoidance of law enforcement problems by means of a geographic separation of experimental

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113. There is currently no pending legislation that would change section 10(j).

114. *McKittrick*, 142 F.3d at 1175 (quoting H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.A.N. 2807, 2833 and 16 U.S.C. § 1539(j)(1) (1982)) (emphasis added) (citation omitted).

and naturally occurring populations. Any interpretation of the “wholly separate geographically” requirement, and of the statute itself, must conform to these stated purposes of the Act.

Stated differently, the statute must be enacted in a manner that will not compromise the integrity, well-being, or future growth of naturally occurring wildlife populations. Further, it must be implemented in a manner that avoids problems of law enforcement and that comports with the “wholly separate geographically” requirement as set forth by its creators. Though it correctly stated the law of experimental populations, construing the statute in the manner suggested by the *McKittrick* court will not result in the creation of an experimental population that meets the stated purpose of section 10(j), but instead creates one in direct violation of it.

*1. McKittrick’s interpretation of “wholly separate geographically” directly contradicts the stated purpose of section 10(j)*

In Part II(A)(2) of its opinion, the *McKittrick* court states, “We do not agree with the Wyoming District Court [ ] that section 10(j) must be read to apply to individual specimens as well as populations. . . . FWS has interpreted the ‘wholly separate geographically’ requirement only to apply to populations; this interpretation is reasonable and we decline to disturb it.”<sup>115</sup> What the court fails to see, however, is how contradictory this interpretation is with congressional intent as found in the legislative history of section 10(j).<sup>116</sup>

To begin, the statute itself states not only that experimental populations and naturally occurring populations must be “wholly separate geographically” from one another, but also that the release of an experimental population must occur “outside the current range of such species.”<sup>117</sup> If the *McKittrick* court’s interpretation of this portion of the statute is correct, then Congress must have meant that, in the case of the northern Rocky Mountain gray wolf, the range of the naturally occurring populations under the statute is only those areas of land in which “at least two breeding pairs of gray wolves that each successfully raise at least two young to December

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115. *Id.*

116. See H.R. REP. NO. 97-567, at 33, reprinted in 1982 U.S.C.C.A.N. 2807, 2833.

117. 16 U.S.C. § 1539(j)(2)(A) (1982); see also Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.81 (1998).

31 of their birth year for 2 consecutive years”<sup>118</sup> might be found to roam together.<sup>119</sup> Otherwise, the wanderings of a lone wolf could define the species’ range, and release of experimental animals into that range would violate the statute.<sup>120</sup> Further, under the *McKittrick* interpretation, Congress must have meant that the “wholly separate geographically” requirement is also met as long as two such breeding pairs from the experimental populations are not released into an area in which they might overlap with two similar such pairs from the natural occurring population.<sup>121</sup> A look at two hypothetical situations, neither of which is a violation of section 10(j) under the *McKittrick* interpretation of that statute, makes it clear that the Ninth Circuit’s ruling does in fact violate congressional intent.<sup>122</sup>

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118. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,256 (1994) (to be codified at 50 C.F.R. pt. 17).

119. The release area for the current Yellowstone and central Idaho experimental populations is within an area in which single wolves from naturally occurring northern populations have been known to roam, but the *McKittrick* court found that this is outside the “current range” of the species because no two breeding pairs have been seen in the area. See *McKittrick*, 142 F.3d at 1175.

120. For example, in the case of *canis lupus*, naturally occurring breeding pairs can be found in northern Montana, but not in central Idaho or in Yellowstone National Park. Lone wolves, however, have been spotted in the latter two locations. The *McKittrick* court held that the release of wolves into central Idaho and Yellowstone National Park was a release “outside the current range” of the naturally occurring wolf. See *McKittrick*, 142 F.3d at 1173, 1178. However, a release into northern Montana would have been improper because breeding pairs from each population would have mixed with pairs from the other. Thus, only those areas where breeding pairs exist constitute the current range of *canis lupus*, and not those places where lone wolves wander.

121. See also Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. at 60,257. Again, *McKittrick* holds that there is only a violation when populations as defined by the FWS overlap.

122. Each of these two hypotheticals is possible in that they are both consistent with the documented nature of wolves and their wanderings. See generally *id.* at 60,261 (“It is documented that individual wolves may disperse over 500 miles. . . . The presence of reintroduced wolves may increase the probability of naturally dispersing wolves from northwestern Montana or Canada to move into, stay, and reproduce in an experimental area.”); *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349, 1375 n.40 (D. Wyo. 1997) (“Yellowstone Park is well within the dispersal range of the breeding population in northwestern Montana. . . . One wolf from the Glacier Park area dispersed 522 miles (straight line distance) into Canada, whereas the distance from Glacier Park to Yellowstone is only 300 miles.”) (quoting Admin. Rec. II.I.1(6)) (emphasis removed), *rev’d*, 199 F.3d 1224 (10th Cir. 2000); *Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1233 (10th Cir. 2000) (“The Agencies do not dispute individual wolves may leave (and, from time to time, have left) Canada and Montana and enter the experimental population areas in central Idaho and Yellowstone.”).

*a. Hypothetical number one.* Taking the court's words at face value, if a group of two or three male wolves originating from a natural population in northern Montana were to consistently make their way into Yellowstone National Park during their extensive winter travels, leaving all of the female members of their pack behind within the borders of Glacier National Park, the range of the naturally occurring wolves, under the *McKittrick* definition, would not include Yellowstone National Park.<sup>123</sup> This would be true even if the male wolves made the journey to Yellowstone every year for ten years, because under the literal rule of *McKittrick*, the range of the natural species is only that area in which two breeding pairs that meet the statutory requirements roam. In such a situation, then, the range of the wolves would only include those areas within the borders of Glacier National Park in which the two male and two female wolves from the naturally occurring population roamed together as breeding pairs. Thus, under the *McKittrick* standard, reintroducing imported wolves into Yellowstone National Park and designating them as an experimental population under such a scenario would be appropriate under the statute because the imported wolves would be introduced "outside the current range of the species."<sup>124</sup>

*b. Hypothetical number two.* To further apply the literal ruling of *McKittrick*, the "wholly separate geographically" requirement would not be violated if a pack of six or eight experimental wolves, consisting of both male and female members of the species, were released into the same area as a single natural occurring male and female breeding pair with a litter of cubs and any number of nonbreeding elderly animals in tow. This is true because two breeding pairs from the experimental population would not be overlapping with two naturally occurring breeding pairs. Though under this scenario ten or more experimental and natural animals might interact, *McKittrick* would hold that no "overlap" had occurred.

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123. The same result under *McKittrick* would apply if the group consisted of two mature males, a young female with a litter of pups, and an older female not a member of a breeding pair. In such a situation, and any other infinite number of possible situations, the travelling pack would not be within its range, under the *McKittrick* holding, because no two breeding pairs would be travelling that area together, meaning that there was no population under the *McKittrick* standard.

124. The defendants in *Wyoming* argued that the experimental populations were released outside the current range of naturally occurring wolves. The court, however, rejected this argument because "the plain language of § 10(j)(2)(A) speaks to the range of the 'species' without specific reference to a 'population.'" *Wyoming*, 987 F. Supp. at 1375.

Nor would the requirement be violated if the same pack of male experimental wolves and their female counterparts were released into the wilderness and one or two males, a single female, and any number of nonbreeding specimens (whether old or young) from the experimental population then wandered into lands densely populated by naturally occurring male and female wolves because there would be no overlap of two breeding pairs from each group. In fact, the statute would not even be violated when, in this second scenario, members of the released pack met and bred with females from the naturally occurring group because, again, two breeding pairs from each group would not be intermingling.

*McKittrick* clearly holds that the “wholly separate geographically” provision is only violated when experimental populations, consisting of at least two breeding pairs that meet the dictated requirements, are released in an area where they are not wholly separate geographically from naturally occurring populations made up of the same two breeding pair definition.<sup>125</sup> Again, none of the above wolf-release scenarios, though possibly extreme and purely hypothetical, violates the *McKittrick* definition of “wholly separate geographically,” even if they result in direct and possibly even long-term interaction and interbreeding amongst the groups.

*c. Hypothetical number three.* A third hypothetical situation, clearly permissible under the *McKittrick* rule, might include a mixing of any number of breeding and nonbreeding experimental wolves with a pack of natural wolves consisting of one historically successful breeding pair with young cubs, any number of nonbreeding wolves, and a second breeding pair which has only managed to raise two young to December thirty-first of their birth year for just one year. In that situation, as with the previous hypothetical situations, a mixing of more than ten wolves, a distinct possibility under this situation, would not violate the “wholly separate geographically” requirement as interpreted by *McKittrick* because populations of wolves, as defined by the FWS, would not be overlapping. Further, under the *McKittrick* rule, the statute would be wholly followed when more than two breeding pairs from each side, each having successfully raised two young for two consecutive years, mingled every day between the births of the young and December thirtieth of the

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125. See *United States v. McKittrick* 142 F.3d 1170, 1175 (9th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).

birth year of the second year's litter of cubs. In this situation, no populations as defined by the FWS would be interacting because the second year's cubs would not have reached December thirty-first of their birth year. However, when the clock struck midnight on December thirty-first, the interactions, which might have been going on for months, would instantaneously become a violation of the *McKittrick* court's definition of "wholly separate geographically." It makes no sense that constant interaction between such groups could be legal one minute and a violation of the ESA the next. But again, under *McKittrick*, the "wholly separate geographically" requirement is only violated if there is interaction among four breeding pairs—two from natural populations and two from experimental populations—that have successfully raised young for two years. Any other combination, regardless of the number of wolves involved, is not a violation under *McKittrick*, even if that number exceeds ten or twenty wolves.

It seems clear that in any of the above scenarios, all of which are clearly permissible under the *McKittrick* interpretation of "wholly separate geographically," congressional intent under section 10(j) and the intent of the Final Rules for the Yellowstone recovery plan are violated. The legislative history makes clear that, in order for an experimental population to receive the special treatment afforded such populations under the statute, those populations must be released "outside the current range" of naturally occurring populations of the species.<sup>126</sup> Technical definitions of population aside, it simply does not make sense that, as in hypothetical one, a group of male or female wolves could every year leave their breeding partners behind, travel a few hundred miles, and live and hunt in that distant region without making that region a part of their range. Nor does it make sense that, as in hypothetical two, the wandering of male experimental wolves into a population of naturally occurring females, or any number of other permissible scenarios which under *McKittrick*'s reasoning would not violate the statute, can be a legitimate interpretation of a release "outside the current range" of the species. In sum, it simply does not fit that groups of ten or more animals can interact with one another but still do not "overlap" because they do not meet the definition of population as set forth by the FWS.

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126. H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833; *see also* Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.81 (1998).



*d. Another way in which the hypotheticals allow a violation of an underlying purpose of the statute.* Section 10(j) itself states that any release of experimental populations must be done in such a way that naturally occurring populations are protected from compromise, and, further, in such a way that no problems of law enforcement, including distinguishing between experimental wolves and naturally occurring ones, are unnecessarily created.<sup>127</sup> The Final Rules for the Yellowstone reintroduction add to the meaning of section 10(j) by making it clear that it is the desire of the Fish and Wildlife Service and the Department of Interior to allow the natural wolf populations in northern Montana to expand to the south under their own power.<sup>128</sup> It is further the desire of these groups to create experimental populations in areas that will not compromise this natural expansion.<sup>129</sup> Again, as previously demonstrated, a scenario in which an experimental group of male and female wolves is placed in an area in which naturally occurring male wolves consistently roam, under the ruling of the *McKittrick* court, may not be a violation of section 10(j).

However, such a situation does violate the intent of section 10(j) and the desires of the FWS to protect natural populations from outside influence and to let them naturally expand throughout their original historic range, because in such a circumstance outside influences would most certainly play a part in the growth of the wolf populations in that area. In such a case, it is likely that at least some naturally occurring male wolves might breed with female wolves from the experimental population instead of with natural females, thus disturbing the natural propagation of the natural populations. Further, it is entirely possible that experimental males might reproduce with natural females in a similar situation. In allowing either situation, including one in which the cross-breeding animal is a lone wanderer, the *McKittrick* court's ruling goes completely against the intent of the Final Rules for implementing section 10(j) for the benefit of the decimated wolf populations because natural populations will not be propagating under their own power, but with the

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127. See 16 U.S.C. § 1539(j) (1982).

128. See Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,259 (1994) (to be codified at 50 C.F.R. pt. 17).

129. See *id.*

assistance of experimental wolves.<sup>130</sup>

As the above reasons show, the *McKittrick* interpretation of “wholly separate geographically” is incorrect, in that it would allow violations of congressional intent, and violations of the desires and plans of the administrative agency charged with implementing section 10(j). Further, those same reasons show that the controversial *Wyoming* interpretation was correct, meaning that any interaction between experimental and natural populations, including the possible wandering of lone natural wolves into experimental areas, violates the “wholly separate geographically” requirement. In other words, only complete separation guarantees that there will be no violation of the “wholly separate geographically” requirement.

*2. The McKittrick view violates congressional intent as recorded in the legislative history of section 10(j) of the ESA*

A close look at an important portion of the legislative history of section 10(j) of the amended ESA strengthens the argument that the *McKittrick* court’s interpretation of the “wholly separate geographically” requirement is incorrect. A portion of the Merchant Marine and Fisheries Committee’s House Report, which discusses the requirement, reads, “Thus, for example, in the case of the introduction of *individuals* of a listed fish species into a portion of a stream where the same species already occurs, the introduced *specimens* would not be treated as an ‘experimental population’ separate from the non-introduced specimens,”<sup>131</sup> meaning that no experimental population would be created in such a situation and treating introduced animals as experimental would be improper. The report then reads, “On the other hand, specimens of the same species introduced into a portion of a stream separate from any natural population, such as when a reservoir or other manmade or natural obstacle *acts as a barrier to fish*

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130. One might argue that if such overlap began to occur wildlife officials could simply remove the experimental wolves and place them in distant areas so that they wouldn’t interfere with natural propagation. However, to do so would be an expensive burden and could be deemed a “problem[] of law enforcement,” which section 10(j) says should be avoided. This would particularly be a problem if wildlife officials had to manually separate natural and experimental wolves. The “wholly separate geographically” requirement seeks to avoid situations such as these—situations that the *McKittrick* court says should be allowed because they do not violate the “wholly separate geographically” requirement.

131. H.R. REP. NO. 97-567, at 33, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833 (emphasis added).

*passage*, would qualify as an experimental population.”<sup>132</sup>

This example is easily applied to the reintroduced wolf populations. If, under the example, the government introduces *individuals* of a listed wolf species into a portion of the forest where the same species—not population but species—already occurs, the introduced wolf *specimens* should not be treated as experimental wolves as they are not separate from naturally occurring animals. Under such a rule, then, if *canis lupus* is found to “occur” in central Idaho, then any wolves reintroduced to the area must necessarily be treated as members of an endangered species as the statute dictates. It follows, then, that any treatment of wolves as experimental would be unlawful and in violation of the ESA. Wolves do naturally occur in central Idaho; numerous wolf sightings have been documented within the state.<sup>133</sup> Further, wolves reintroduced to this area have been treated as threatened and not as endangered. Thus, applying the wolf situation to the example given in the legislative history shows a clear violation of congressional intent.<sup>134</sup>

On the other hand, if, as in the example, specimens of an experimental wolf population were to be introduced into a portion of the forest “separate from any natural population,” such as when a “manmade or natural obstacle acts as a *barrier to [wolf] passage*,” then a legitimate experimental wolf population would be created. Under such a scenario, treating reintroduced wolves as threatened would be proper because a barrier to interaction exists to keep the populations “wholly separate geographically” from one another.

It must be conceded that the legislative history does not clearly state that a situation such as that given in the legislative history is the only one in which an experimental population can legitimately be created; nor does the legislative history specifically state that anything less will be unacceptable. However, the example makes clear

132. *Id.* (emphasis added).

133. See *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349, 1353 (D. Wyo. 1997), *rev’d*, 199 F.3d 1224 (10th Cir. 2000). Populations as defined by the FWS might not occur in central Idaho (some would strongly disagree with this statement—see *supra* note 80), but the fact that wolf sightings have been documented in the area shows that the “species” does occur there. No specialized definition of “species” has been given which contradicts this conclusion.

134. In the *Wyoming* decision, Judge Downes addresses in some detail this particular violation of legislative intent. See *generally id.* at 1375 (“As evidenced by the legislative history . . . , Congress clearly intended to guard against the overlap of introduced and non-introduced ‘individuals’ or ‘specimens’ of a particular species.”).

that, to Congress, a “wholly separate geographically” situation is one in which there is a separation of natural and experimental populations and some sort of natural or manmade *barrier to passage* exists. In the current wolf situation, no such barrier or separation exists. In fact, the documented presence of lone wolves from natural populations in experimental areas proves that no barrier to wolf passage exists. Thus, the desires of Congress as set forth in the legislative history are not being wholly met under the current situation.

*3. The Yellowstone and central Idaho experimental populations should not be treated as experimental populations*

Since their release into Yellowstone and central Idaho, the reintroduced populations of Canadian gray wolves have been treated as threatened. They have been reintroduced, relocated, and in some cases killed by wildlife officials.<sup>135</sup> Because these central Idaho and Yellowstone wolf populations are not “wholly separate geographically” from naturally occurring populations, treating them in such a way is improper under the law. The legislative history of section 10(j) states that “[i]f an introduced population overlaps with natural populations of the same species during a portion of the year . . . the introduced population is to be treated as an experimental population at such times as it is wholly separate.”<sup>136</sup> Because there has in fact been geographic overlap, resulting in a direct violation of the “wholly separate geographically” requirement, the threatened-species treatment given the populations over the past four years has been improper and illegal. The reintroduced populations should have been treated as endangered and not simply as threatened, or they should not have been released into the wilderness at all.<sup>137</sup>

135. See Gibeaut, *supra* note 1, at 58.

136. H.R. REP. NO. 97-567, at 33, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

137. A look at the legislative history of section 10(j) of the ESA shows that Congress is not necessarily opposed to overlap of reintroduced and natural populations. The example given, and the wording of the statute itself, shows that eventually overlap is possible and even likely. What Congress *is* opposed to is the compromising of natural populations by the existence of experimental wolves and the treatment of experimental wolves as experimental during these times of overlap. Such treatment has occurred, and congressional intent has therefore been violated.

4. *The McKittrick court should have sided with Wyoming*

Despite the negative effects of the *Wyoming* decision, including the possible death of the experimental wolf populations and certain uproar amongst wildlife conservation groups, the *McKittrick* court, for the aforementioned reasons, should have concurred with its outcome. Regardless of the benefit that they may bring to their historic habitats, the experimental populations are a violation of the very law that created them; they have been treated as experimental when they are simply not “wholly separate geographically” from natural populations of the same species. As such, they cannot legally be treated as experimental and must either be treated as endangered—thus taking away all management flexibility—or they must be removed. Neither result is ideal or even preferable, but the law dictates that it must be so. To uphold the law, the *McKittrick* court should have so held.

5. *The Tenth Circuit should have affirmed Wyoming*

In its reversal of the Wyoming district court’s 1997 decision in *Wyoming*, the Tenth Circuit Court of Appeals interpreted the ESA and its legislative history in a manner very similar to that provided by the Ninth Circuit Court of Appeals in its opinion in *McKittrick*. As such, they too should have agreed with the Wyoming district court and held that the experimental wolf populations now residing in Yellowstone National Park and central Idaho have been created in violation of the very law that allows their existence.

*B. A Call for a Change in the Law*

Though the Ninth and Tenth Circuits have both held that the experimental wolf populations in Yellowstone Park and central Idaho are not in violation of the ESA, the law needs to be changed. As this Note explains, these decisions incorrectly interpret section 10(j) of the ESA. If they are overturned, or if new reintroduction projects are undertaken by the Secretary of the Interior, the problems that have plagued wolf-reintroduction efforts will rise again. The sections of the ESA that deal with experimental populations are inadequate and flawed, and the only way to deal fairly not only with the wolves, those in favor of reintroduction, and those opposed to reintroduction, but with future subjects of reintroduction as well, is to change

the law in such a way that all interests can be adequately met. Tensions that have arisen can thereby significantly be reduced.<sup>138</sup>

*1. Flaws in the current law*

A close look at section 10(j), its stated purpose, and the reasoning behind it clearly shows that the law is flawed. Many of the problems that have arisen in recent court proceedings are a result of these inadequacies. Clearly, the most problematic portion of the current law is the “wholly separate geographically” requirement of section 10(j). As has been demonstrated, much litigation and controversy has arisen with regard to this portion of the statute and the proper interpretation that it should be given. There are, however, other weaknesses in the law as well.

*a. Conflict regarding the treatment of overlapping populations.* First, questions have arisen as to how experimental populations should be treated when they mix with naturally occurring populations of the same species. The legislative history of section 10(j) appears to be clear on the subject, but the Final Rules for gray wolf reintroduction in the Yellowstone experimental area and the discussion of experimental populations contained in the *Code of Federal Regulations* directly contradict the legislative history. The pertinent portion of the legislative history states,

The Committee carefully considered how to treat introduced populations that overlap, in whole or in part, [with] natural populations of the same species. . . . If an introduced population overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times, the introduced population is to be treated as an experimental population at such times as it is wholly separate.<sup>139</sup>

Thus, only in times of geographic separation are experimental populations to be treated as such. It naturally follows from the statute, then, that the introduced populations are to be treated as fully

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138. The fact that many problems have arisen in the application of section 10(j) to wolf reintroduction demonstrates that the law allowing the creation of experimental populations is flawed. Further, wildlife reintroduction programs are not going away any time soon, so it is possible that the same problems will plague future reintroduction efforts as well. By changing the law, Congress will be eliminating the difficulties that have arisen in recent years as wolves have taken center stage in the wildlife-reintroduction arena and will thereby prevent similar problems from slowing future reintroduction efforts.

139. H.R. REP. NO. 97-567, at 33, *reprinted in* 1982 U.S.C.A.N. 2807, 2833.

endangered at those times of the year in which they do overlap with natural populations, receiving the same protections under the ESA that the natural populations legally receive.

The Final Rules for the reintroduction of gray wolves into Yellowstone National Park, however, are internally inconsistent. The Rules state, "It is possible that prior to 2002, other wolves may appear in the wild and be attracted to the experimental area occupied by the reintroduced wolves. Any 'new' arrivals would be classified as part of the experimental population."<sup>140</sup> This proposal is clearly contrary to legislative intent, as evidenced by the scenario set forth in the Final Rules. In that scenario, natural wolves enter the designated experimental areas and thus create the situations of overlap referred to in the legislative history. Treating them as experimental goes against the desires of Congress as set forth in the legislative history, which states that the experimental populations should be treated as experimental only at such times as they are wholly separate geographically from naturally occurring populations.<sup>141</sup> The current application of the law follows the Final Rules and the *Code of Federal Regulations*. Thus, there exists yet another violation of congressional intent in the application of the law.<sup>142</sup>

The contradiction is also apparent within the *Code of Federal Regulations*. The code section on experimental populations at one point states, "Where *part* of an experimental population overlaps with natural populations of the same species on a particular occasion, . . . specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap."<sup>143</sup> However, after admitting that experimental wolves have been known to

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140. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252-60,256 (1994) (to be codified at 50 C.F.R. pt. 17); *see also* Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.84 (1998).

141. *See* H.R. REP. NO. 97-567, at 33, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2833.

142. One might argue that classifying "new" arrivals as experimental would not violate congressional intent because populations as defined by the FWS would not necessarily be overlapping. Such a designation would only be proper until the time that two breeding pairs met. At that point, such a classification would be improper—the Final Rules, however, do not provide for such a change in the event that two breeding pairs do eventually arrive.

143. Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.80(a) (emphasis added). It is important to note that no distinction is made between overlap in the experimental areas and overlap in the naturally occurring areas when assigning overlapping wolves an experimental designation.

wander into the experimental areas, the same regulation later states, “All wolves found in the wild within the boundaries of [the experimental area] after the first releases will be considered nonessential experimental animals.”<sup>144</sup> Thus, there is even confusion in the government regulations themselves. The regulations first state very clearly that if natural wolves happen to wander into experimental areas and overlap with the experimental populations thereby occurs, the reintroduced wolves are not to be treated as experimental until separation again takes place. However, the same regulations later make it clear that, in the same situation, those same wandering wolves should be treated as experimental. There is clearly a contradiction in the regulations. When such is the case, implementation of the regulations in question is certainly going to be difficult and confusing.

The district court in *Wyoming* also noted this contradiction and expressed concern over its existence. Noting that it was the practice of the FWS to treat natural animals within experimental areas as threatened members of a nonessential experimental population instead of endangered members of a natural listed population, the court held that such treatment “fl[ies] in the face of the statutory language and legislative history which forms the foundation of species preservation.”<sup>145</sup> When situations such as these arise, the court stated, the proper action is to ignore the erroneous interpretation of the statute and apply the law as set forth in the legislative history, which once again states that experimental populations should only be treated as such at times of geographic separation, or at times when no overlap exists.<sup>146</sup>

*b. The law is vague as to what should be done with experimental populations once they are created.* Section 10(j) of the amended ESA contains detailed requirements for the creation of experimental populations. However, once an experimental population is created under the statute, there is no guidance in the statute or in the legislative history regarding what should be done with that experimental population. There is no definite rule in the statute on how long an

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144. Endangered and Threatened Wildlife and Plants, 50 C.F.R. § 17.84.

145. *Wyoming Farm Bureau Fed’n v. Babbitt*, 987 F. Supp. 1349, 1374 (D. Wyo. 1997), *rev’d*, 199 F.3d 1224 (10th Cir. 2000).

146. *See id.*; *see also id.* at 1375-76 (“Defendants’ blanket treatment of all wolves found within the designated experimental population areas as experimental animals is contrary to law.”).



experimental population can be in existence, nor is anything said regarding how long the experimental designation applies to a particular population and how and when it might be removed. Nor does the statute say whether or not such a designation can even be removed. In the context of the wolves, the Final Rules state that it is very likely that in the next few years, natural populations of wolves will be attracted to Yellowstone and central Idaho because of the existence of experimental wolves. Neither the statute nor the Final Rules, however, state what is to be done with the experimental populations when this occurs.

Perhaps it was the intent of Congress to allow the Fish and Wildlife Service and the Department of Interior, the agencies charged with implementing the statute, to supply these details in the implementation of the statute. If such is the case, Congress should have explicitly stated so. Regardless, the law in its current form provides no uniform guidance with regard to these issues.

*c. The law is only a temporary fix to a continuing problem.* Though it is not within the direct scope of section 10(j) of the amended ESA, a potentially more explosive problem exists on the horizon—a problem Congress would be wise to deal with immediately. As one author wrote,

Even if all the wolves are taken out, experts say it's only a matter of time before others migrate to Yellowstone and Idaho from northern Montana, where they have begun to return naturally. New wolves coming into the area without government help would enjoy full protection under the Endangered Species Act and not the limited shield that covers the current experimental wolves.<sup>147</sup>

If the law remains as it is now, in such a situation, the natural wolves would receive complete protection and could not be killed even if caught in the act of killing livestock. Such an occurrence is certain to cause an uproar by ranchers and farmers against the government agencies protecting the animals. Also, if the government were to undertake the nearly impossible task of distinguishing between experimental and naturally occurring wolves, problems of law enforcement that the statute wishes to avoid would certainly arise.

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147. Gibeaut, *supra* note 1, at 58.

## 2. *An amicable solution*

As it now stands, section 10(j) of the ESA is flawed, courts have disagreed over the meaning of that section, and a death sentence—erroneously reversed on appeal—has been handed down to the Yellowstone and central Idaho reintroduced wolves. The ruling of the *McKittrick* court allows the wolves to continue to stalk and kill livestock as long as they are not caught in the act, a true bane for farmers and ranchers. Conversely, the district court's ruling in *Wyoming* requires the Fish and Wildlife Service to completely remove the reintroduced wolves, a nightmare for many wildlife conservationists. The proposed results of the litigation seem to be black or white, with no middle-ground available. Either the wolves can stay with few restrictions, or they must go completely. There is, however, an amicable solution to the problem—a solution which, though requiring modification of the current law, would allow wolf reintroduction to continue in such a way that both sides of the debate would potentially be satisfied with the outcome.<sup>148</sup>

*a. Retain the experimental population rules with certain modifications.* The idea behind the experimental population rule—that of supplementing naturally occurring populations with experimental animals to increase the viability of the species in a large geographic area and more quickly achieve a delisting of that species—is a good one, and it should be retained with regard to the reintroduction of the gray wolf into Yellowstone and central Idaho. While it facilitates reintroduction, conservation, and propagation of endangered species, the rule also allows flexibility in administering the program so as to promote both public approval and healthy growth for wolf populations in the northern Rocky Mountain area. The ability of the Department of Interior and the Fish and Wildlife Service, in conjunction with other government agencies and state governments, to establish and maintain experimental populations, as well as to theoretically control them in such a way that ranchers and farmers will accept their presence, should be promoted at all costs, for the complete loss of the wolf would truly be a tragedy. The retention of the basic underlying premise of section 10(j) will achieve these goals.

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148. Ed Bangs, project leader for the Yellowstone and central Idaho reintroduction effort, has spoken to the issue of wolves and livestock coexisting without trouble. “[I]t doesn’t have to be either wolves or livestock, he says: ‘With proper management we can have both.’” Carpenter & Busch, *supra* note 29, at 76.

Though retention of experimental-population law is a must, much good could be achieved by modifying the law. To begin with, Congress should eliminate the “wholly separate geographically” requirement of section 10(j). At best, all this requirement has achieved to this point is unnecessary litigation and confusion. The goals of gray wolf conservation and the ESA, as well as the conservation of future subjects of reintroduction, can be achieved without such a requirement. Congress should then, in its stead, create legislation that facilitates, or at the very least allows, interaction between natural populations and experimental populations created to further the conservation of the species. Congress should also make rules regarding the treatment of animals in designated experimental areas that will appease ranchers and farmers, satisfy environmentalists and wildlife conservationists, and still allow for propagation of the species. If Congress were to do these things, a viable wolf population could be created, the wolf could eventually be removed from the endangered species list, and modern efforts to replenish the wolf in a satisfactory and less controversial manner would be as successful as were historic efforts to eradicate the wolf from the United States altogether. Further, as additional wildlife restoration projects are undertaken, the problems that have plagued wolf reintroduction would be largely eliminated, resulting in a smoother reintroduction of wildlife into their historic ranges.

*b. Congress should encourage and facilitate interaction and interbreeding between naturally occurring populations and experimental wolves by eliminating the “wholly separate geographically” requirement.* The drafters of the Final Rules for Yellowstone reintroduction stated that “it is possible that prior to 2002, other wolves may appear in the wild and be attracted to the experimental area occupied by the reintroduced wolves.”<sup>149</sup> The *Wyoming* court also recognizes this possibility.<sup>150</sup> The drafters did not think this was necessarily a bad thing, stating that “[t]hese wolves could assist in the recovery and expansion of the experimental population to where wolves could be dispersing into central Idaho and Montana.”<sup>151</sup> This statement makes it

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149. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. 60,252, 60,256 (1994) (to be codified at 50 C.F.R. pt. 17).

150. See *Wyoming*, 987 F. Supp. at 1373 n.36.

151. Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho,

clear that, at least in the minds of the drafters of the Final Rules, interaction between the populations would be beneficial toward the end of achieving the conservation and ultimate delisting of the Rocky Mountain gray wolf. Similarly, a look at the legislative history of section 10(j) shows that Congress, though it desires to protect natural populations from “compromise,” never expressed serious concern over the overlapping of experimental and natural populations, but only at the treatment of such populations as experimental.

Without the “wholly separate geographically” requirement, such a mixture could be facilitated without the legal difficulties we have seen so far. Reintroduced wolves could be released into the Yellowstone and central Idaho areas without the legal controversy that has arisen, and, if the government so desires, these populations could be further controlled so that their existence does not compromise the natural populations to the north. Lone wolves from northern naturally occurring populations could wander as far south as they desire without creating legal controversy, and a mixing of those wolves with experimental populations would be seen as an ecological benefit instead of a legal bane. The result would be a quicker return to viable wolf populations throughout all of the northwest Rocky Mountain area, which is the goal behind the ESA and the wolf-reintroduction plans.

The purpose of the “wholly separate geographically” requirement is to avoid any compromising of naturally occurring populations. If the Fish and Wildlife Service and the Department of Interior felt that in a particular case the best way to achieve this goal was through complete separation, simply allowing them the flexibility of controlling the wanderings of experimental wolves or naturally occurring wolves within the boundaries of designated experimental areas would do the job. If complete separation was the goal, that separation could be facilitated. If complete separation was not the goal, the wolves could be allowed to mix. And when the law is applied to future species, the FWS could simply determine what is best for that particular species and fashion its rules accordingly. Either way, the

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and Montana, 59 Fed. Reg. at 60,256; *see also id.* at 60,261 (“Undoubtedly, the establishment of a viable wolf population and recovery of the species will be enhanced by the reintroduction of 30 wolves annually for the next 3-5 years. The presence of reintroduced wolves may increase the probability of naturally dispersing wolves from northwestern Montana or Canada to move into, stay, and reproduce in an experimental area. . . . [T]his event would contribute to population recovery . . .”).

“wholly separate geographically” requirement is not necessary to adequately control the wolf populations.

*c. Treat all wolves found within the experimental areas as threatened, thus retaining the benefits of flexible management.* The Final Rules for the establishment of a nonessential experimental population of gray wolves in Yellowstone National Park state that any “new arrivals” of naturally occurring wolves into the experimental areas should “be classified [by the FWS] as part of the experimental population.”<sup>152</sup> This idea, though completely contrary to the law as set forth in the legislative history of section 10(j), has much virtue.

A significant reason behind the “wholly separate geographically” requirement is that such separation will facilitate easier enforcement of the law and control of the experimental populations, meaning wildlife officials need not worry about determining which wolves in a group are natural and which are experimental. Ranchers want this flexibility so that they can defend their livestock and their livelihoods, and they should get it. Changing the law to allow those few naturally occurring wolves in experimental areas to be treated as threatened and subject to the flexibility of experimental populations would eliminate problems of distinction between naturally occurring wolves and experimental wolves for the purpose of law enforcement and would lessen the impact of those problems that would arise if natural wolves were to wander into experimental areas. The Final Rules call for it, and the law should be changed to allow it.

For example, under such a law, the Department of Interior could designate a particular geographic area, such as the Frank Church Wilderness Area in central Idaho, as an experimental area and then release experimental Canadian gray wolves into that area. Treating the wolves as threatened would provide government agents the flexibility in controlling the wolves that they need to appease public opposition while facilitating the growth of wolves in the designated area, thus meeting the goals of section 10(j) and experimental-population law. Further, if wolves from northern Montana were to wander into those designated areas, treating them as experimental would not compromise the northern populations. Instead, it would allow interaction and rapid growth of wolf populations throughout both northern Montana and central Idaho without creating problems of law enforcement while still keeping oppositionists placated.

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152. *Id.* at 60,256.

Wildlife officials would be able to relocate or kill problematic wolves, whether they be natural or experimental, thereby appeasing ranchers and farmers.

*d. Create a viable wolf population in the northern Rocky Mountains and delist the gray wolf.* If these changes to the law were made and reintroduction continued under new laws, the ultimate goal of the Wolf Recovery Plan would be quickly achieved. The goal of the plan is to create viable wolf populations within the first few years of the new millenium and then to delist the gray wolf as an endangered species. Under such a plan as that proposed in this Note, wolf populations would become strong not in two separate areas, but all throughout the northern Rocky Mountain area.<sup>153</sup> This goal would not be compromised by the proposed changes in the law, but it would likely be achieved more quickly and with adequate protection to ranchers, loggers, and farmers. Also, the inevitable expansion of natural populations into Wyoming and Idaho would not bring with it the problems that it will bring if the natural wolves are designated as endangered at the time of their arrival.

Once a viable wolf population is created in this way, the wolf could be delisted in many areas of the northern Rocky Mountain area. At that point, the Rocky Mountain gray wolf would no longer be considered endangered, and ranchers and farmers would be allowed to continue to protect their herds without the fear of criminal prosecution hanging above their heads.

### *C. Experimental Wolf Populations Would Flourish Under a Changed ESA*

If the ESA sections currently in place matched those proposed in this Note, there would be much less legal controversy and confusion

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153. "[T]he presence of reintroduced wolves may actually attract and hold some dispersing wolves from northwestern Montana." *Wyoming*, 987 F. Supp. at 1373 n.36 (quoting Admin. Rec. II.A.3 at 5-56) (emphasis removed).

Undoubtedly, the establishment of a viable wolf population and recovery of the species will be enhanced by the reintroduction of 30 wolves annually for the next 3-5 years. The presence of reintroduced wolves may increase the probability of naturally dispersing wolves from northwestern Montana or Canada to move into, stay, and reproduce in an experimental area. . . . [T]his event would contribute to population recovery . . . .

Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Gray Wolves in Yellowstone National Park in Wyoming, Idaho, and Montana, 59 Fed. Reg. at 60,261.

surrounding the reintroduction of the Rocky Mountain gray wolf into the Yellowstone and central Idaho areas.

To begin with, the controversy over the meaning of “wholly separate geographically” which has been generated by the *McKittrick* and *Wyoming* courts would be essentially moot. There would be no need to fight over the meaning of this ambiguous phrase and whether or not it applies to lone wolves. In fact, the wandering of lone wolves from northern, naturally occurring populations would be celebrated as a major step towards conservation of the Rocky Mountain gray wolf. The wolves would be free to roam where they please—as long as those roamings do not include attacks on humans or livestock—and northern populations would have more reason to expand to the south. Thus, a single strong population of wolves throughout the northern Rocky Mountain area would be created instead of two strong populations separated from one another by hundreds of miles and, more detrimentally, by the law.

Under the proposed changes, wildlife officials would still retain the flexibility in management that is so critical to the success of reintroduction programs. Certain areas of land, such as Yellowstone National Park and the Frank Church River of No Return Wilderness area in central Idaho would be designated as experimental areas, and all wolves, natural or experimental, that wandered into those areas would be treated as threatened. Such a situation would be beneficial to ranchers and farmers because the newly introduced wolves could be controlled by wildlife officials. It would be completely unfair to spring wolves, whether experimentally introduced or naturally drawn, upon ranchers and farmers who have been in these areas for years and then inform them that the wolves are free to do whatever they wish. Thus, the retention of flexible management would be of benefit to these individuals. Further, the desires of conservationists and wolf activists would be met because wolves would be reintroduced into areas within their historic ranges. Some troubles would certainly arise, but those troubles could be dealt with swiftly and appropriately under the flexible management system that would be in place in experimental areas.

Finally, and perhaps most importantly, the wolf populations throughout all of the northern Rocky Mountain area would flourish under such a system. Interaction amongst wolf populations would facilitate greater opportunities for breeding and growth of the wolf population as a whole. As such, the general desire for propagation

and conservation of the wolf species would be met and the Rocky Mountain gray wolf finally, after years of struggling just to survive, could be taken off the United States' list of endangered species.

*D. Future Subjects of Reintroduction Would Flourish Under a Changed ESA*

As this Note points out, the wolf-reintroduction efforts of the past few years have faced much opposition and difficulty. Perhaps the greatest benefit that might arise from a change in the law would be the prevention of similar problems in future reintroduction efforts. Wildlife reintroduction is certain to continue under the ESA, and a plan that helps reduce problems associated with wolf reintroduction will certainly reduce potential problems associated with the reintroduction of other types of animals as well. Such a reduction in difficulty in turn will reduce litigation over, and opposition to, reintroduction efforts. Further, it will provide for all involved more positive results and a more optimistic view of wildlife reintroduction.

V. CONCLUSION

The issues at stake in the current wolf reintroduction litigation directly affect the lives and livelihoods of many people. When the whooping crane was reintroduced to Florida and parts of the western United States, there was little if no opposition.<sup>154</sup> Similarly, current efforts to reintroduce the Colorado cutthroat to Utah lakes and streams are without controversy.<sup>155</sup> But wolves are different from whooping cranes and cutthroat trout. Wolves are predators and killers, and few are afraid to go up against humans, at least indirectly. For ranchers, hunters, farmers, and others who work the land, wolves are deadly nuisances and vicious tormenters that stalk and kill livestock and game. Because of this direct and destructive influence on their livelihoods, opposition to wolf reintroduction by these groups is strong.

154. See Cribb, *supra* note 6, at 50.

155. Many other animal species have been successfully reintroduced to their historic ranges without much controversy. See generally Robert L. Glicksman & George Cameron Coggins, *Wilderness in Context*, 76 DENV. U. L. REV. 383, 397 (1999) ("In reality, however, a number of other reintroduction programs have been quite successful and relatively uncontroversial. Wild turkeys and otters in Missouri, pronghorn antelope in Kansas, condors in the Southwest, and elk in Wisconsin are just a few of the instances in which humans are recreating aspects of nature that humans had earlier eradicated.") (footnotes omitted).



On the other side, conservationists and wildlife activists say that the wolves inhabited the lands now used for grazing long before ranchers and farmers set their sights upon it. To these people, a return of wolves to their historic habitats is only fair. Further, many will argue that the return of the wolf is a victory for the natural ecosystem because it is an important member of the system and has long been absent from many areas. Such believers are no less adamant or vocal about the correctness of their own opinions than are farmers and ranchers about theirs.

Because the issues at stake in the litigation are so vitally important to many people, as well as to the wolves and the ultimate conservation of their species, it is critical that they be handled properly. It is unfair to both sides to restrict the solution to black and white answers, to allow the wolves either to stay virtually unchecked as the ruling in *McKittrick* and the Tenth Circuit reversal of *Wyoming* unavoidably does,<sup>156</sup> or to demand that the wolves be removed completely and possibly even killed, which the *Wyoming* district court requires. Under the current state of the law, only these black and white answers are available. Consequently, one side of the debate is going to lose.

Neither side, however, needs to be a loser. If the laws creating experimental populations are changed, litigation and confusion resulting from vague and ambiguous phrases such as “wholly separate geographically” could be eliminated, and the goals of the ESA and the Northern Rocky Mountain Wolf Recovery Plan could more efficiently and effectively be met. The legislative history of section 10(j) clearly shows that Congress is not opposed to the overlapping of experimental and naturally occurring populations, but it is simply concerned that reintroduction not compromise natural population growth and that there be proper treatment of both sides when this overlapping occurs.<sup>157</sup> Because Congress has not forbidden it, wild-

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156. Again, the only recourse available to a rancher whose cattle have been lost to wolves is to shoot the trouble-causing wolf, but only when it is caught in the act of killing the livestock. Further, the rancher's loss will not be compensated by the United States or the FWS, but by a private group willing to compensate ranchers only when they can prove conclusively that their livestock have been killed by wolves. Because the restrictions are so great, many ranchers lose livestock to wolves without compensation for their losses. See Davila, *supra* note 19, at A1 (“But the compensation program, ranchers say, is tantamount to an insurance agency paying only if it sees the car accident. Herds are out to pasture for months; finding a carcass for proof is often impossible.”).

157. The legislative history reads,

life officials should seek to facilitate and promote such an overlapping, for doing so would clearly strengthen the wolf population throughout the Rocky Mountain region as a whole.<sup>158</sup>

This overlapping cannot be achieved under the current state of the law because of the confusion surrounding the “wholly separate geographically” requirement of section 10(j) and the other weaknesses in the law. Wolf reintroduction efforts would not be harmed if this provision were to be removed and the manner of treatment of overlapping populations was clarified. In fact, wolf populations throughout the northern Rocky Mountain area would only be more quickly strengthened. As it now stands, the law is flawed. Making the changes suggested in this Note would allow flexible management of the wolves while eliminating the confusion and litigation that have arisen in the past few years. The result would be a better one for ranchers, conservationists, and for the wolves themselves.<sup>159</sup> Additionally, and perhaps most important, the changes proposed in this Note will reduce the possibility that problems like those which have arisen in the wolf-reintroduction context will plague future wildlife-reintroduction projects, which will result in a better reintroduction experience for all involved.

*Daniel R. Dinger*

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The Committee carefully considered how to treat introduced populations that overlap, in whole or in part, natural populations of the same species. . . . If an introduced population overlaps with natural populations of the same species during a portion of the year, but is wholly separate at other times, the introduced population is to be treated as an experimental population at such times as it is wholly separate.”

H.R. REP. NO. 97-567, at 33 (1982), *reprinted in* 1982 U.S.C.A.N. 2807, 2833. It is clear from this portion of the legislative history that overlap is seen as a distinct possibility. Again, Congress does not appear to be overly concerned about overlap. They are simply concerned that when overlap occurs, proper treatment of the wolves is effected.

158. *See supra* note 151.

159. It is conceded that the solutions proposed in this Note will not immediately alleviate wholly the concerns of ranchers for the preservation of their livestock. For a time, until the gray wolf is ultimately delisted, ranchers will be forced to continue to work with the FWS under the current system to control those wolves and wolf packs causing harm to their livestock. However, the changes proposed in this Note will more quickly facilitate a delisting of the gray wolf, which means a quicker return to a time when ranchers are not so restricted in their means of protecting their livestock and retaliating against the inevitable wolf attacks.